

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 695**

**ZIFFRIN, INCORPORATED, APPELLANT,**

**vs.**

**JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,  
ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY**

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**FILED FEBRUARY 29, 1939.**



## ERRATA

page 21, line 4, add the figure "1" following the word "July" so that the line will read:

"to July 1, 1938; defendants have threatened to enforce, and"

page 24, line 20, add a comma following the word "civil" so that the line will read:

"to be brought, either directly or indirectly, any civil, criminal"

page 35, line 6 of the paragraph numbered "1.", change the word "or" to "are" so that the line will read:

"for nor are the facts stated sufficient to entitle plaintiff to any"

page 38, line 22, the last word should be completed by adding the letter "m" and the conclusion of the sentence indicated by a period so that the line will read:

"eral of the Commonwealth of Kentucky, or any of them."

page 61, line 2, change the word "distinction" to "destination" so that the line will read:

"possibility to determine the quantity or destination, whether"

page 61, line 8, change the word "here" to "her" so that the line will read:

"greater means by which Kentucky could mistreat her citi-":



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[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF KENTUCKY**

In Equity. No. 1210

**ZIFFRIN, INCORPORATED, Plaintiff,**

**v.**

**JAMES W. MARTIN, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board; Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, Defendants**

**BILL OF COMPLAINT—Filed July 18, 1938**

The plaintiff, Ziffrin, Incorporated, for bill of complaint and statement of cause of action herein against the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, [fol. 2] Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, states as follows:

At all of the times hereinafter mentioned the plaintiff, Ziffrin, Incorporated, was, ever since has been, and now is, a corporation created, organized and existing under and



by virtue of the laws of the State of Indiana, and was, and is, empowered by said laws to contract and be contracted with, to engage in the hereinafter mentioned business of a contract carrier by motor vehicle for hire, and to sue and be sued, by and under its corporate name, Ziffrin, Incorporated. At all of said times plaintiff had and maintained, and now has and maintains, its principal office and place of business in the City of Indianapolis, in the County of Marion, in the State of Indiana, and at all of said times plaintiff was, and is, a citizen and resident of said City of Indianapolis in said State of Indiana.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, James W. Martin, was, ever since has been, and now is, the duly appointed, qualified and acting Commissioner of Revenue of the Commonwealth of Kentucky, and a duly appointed, qualified and acting member of the Kentucky Tax Commission, and a duly appointed, constituted, qualified and acting member of the Kentucky State Alcoholic Beverage Control Board and was, and is, a citizen and resident of the City of Lexington, in Fayette County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, Emory G. Dent, was, ever since has been, and now is, a duly appointed, qualified and acting [fol. 3] member of said Kentucky Tax Commission and a duly appointed, qualified, constituted and acting member of said Kentucky State Alcoholic Beverage Control Board, and was, and is, a citizen and resident of the City of Bowling Green, in Warren County, in the State of Kentucky.

At all of the times hereinafter mentioned on and subsequent to March 6, 1938, the defendant, C. M. C. Porter, was, and is, a duly appointed, qualified and acting member of said Kentucky Tax Commission and a duly appointed, qualified, constituted and acting member of said Kentucky State Alcoholic Beverage Control Board, and was, and is, a citizen and resident of Shepherdsville, in Bullitt County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, William E. Baxter, was, ever since has been, and now is, the duly appointed, qualified and acting Distilled Spirits Administrator of said Kentucky State Alcoholic Beverage Control Board, and was,



and is, a citizen and resident of the City of Lexington, in Fayette County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, Hubert Meredith was, ever since has been, and now is, the duly elected, qualified and acting Attorney General of the Commonwealth of Kentucky, and was, and is, a citizen and resident of Greenville, in Muhlenberg County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 7, 1938, the defendant, Harry D. France, was, ever [fol. 4] since has been, and now is, a duly appointed, qualified and acting Assistant Attorney General of the Commonwealth of Kentucky, and was, and is, a citizen and resident of the City of Louisville, in Jefferson County, in the State of Kentucky. Said Harry D. France was appointed Assistant Attorney General as aforesaid by said Hubert Meredith, Attorney General as aforementioned, with and subject to the approval of said Commissioner of Revenue, and with the sole duty to act as legal counsel for the Distilled Spirits Unit and the Malt Beverage Unit of said Kentucky State Alcoholic Beverage Control Board, created, constituted and established by the terms and provisions of the pretended and invalid enactment of a 1938 Session of the General Assembly of Kentucky hereinafter identified, and sometimes known as and called "Alcoholic Beverage Control Law".

This suit and cause is one of a civil nature in equity. The matter in controversy in this cause exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3,000.00) and arises under the Constitution and laws of the United States, and is between citizens of different States.

Continuously at all times subsequent to March 20, 1933, plaintiff, for gain and profit, has been engaged in the business of carrying and transporting goods, wares and merchandise in interstate commerce by motor vehicles and trucks for compensation and hire under and pursuant to individual contracts and agreements made and entered into between the plaintiff and the sellers and consignors and between plaintiff and the purchasers and consignees, of such goods, wares and merchandise. At no time herein mentioned or referred to has the plaintiff in any mode or manner whatsoever undertaken to transport passengers or



property whatever for the general public in interstate or — [fol. 5] foreign commerce by motor vehicle or otherwise for compensation or otherwise over regular or irregular routes, or any route whatever.

Continuously at all of the times herein mentioned the plaintiff's said carrier and trucking business was, and is, one of an established character, and said business was, and is, one of large, substantial and established cash and market value in excess of \$20,000.00 and said business yielded, and yields, to the plaintiff large and substantial pecuniary gain and profit.

At all of the times herein mentioned subsequent to March 6, 1938, said Hubert Meredith, Attorney General as aforesaid, by virtue of his said office has been, and is, the chief law enforcement officer of the Commonwealth of Kentucky and of all of the departments of said Commonwealth, and has been, and is, charged by the laws of said Commonwealth with the duty of enforcing the criminal and penal laws of the Commonwealth of Kentucky, and in prosecuting persons offending said laws, and more particularly has been, and is, charged with the duty of enforcing the penal and criminal provisions of said pretended Alcoholic Beverage Control Law and with the duty of prosecuting persons violating said pretended Act.

At all times subsequent to March 7, 1938, and by the provisions of Section 13 of said Alcoholic Beverage Control Law, defendant, Harry D. France, Assistant Attorney General as aforementioned, has been, and is, charged with the duty of enforcing the penal and criminal provisions of said pretended Act as hereinafter set forth.

At all times subsequent to March 7, 1938, and under the provisions of Section 9 of said pretended Act, the defendant, William E. Baxter, Acting Distilled Spirits Administrator as aforementioned, has been, and is, charged with [fol. 6] the duties of enforcement of said pretended Act and the terms and penal and criminal provisions thereof as hereinafter more particularly set forth.

On or about October 7, 1936, and April 9, 1937, and on or about November 16, 1936, plaintiff made and entered into two written contracts with Schenley Products Company, Inc., a corporation engaged in the business of manufacturing and selling whiskies and distilled alcoholic liquors and spirits, and its affiliates engaged in like businesses, and into a third written contract with Joseph E. Seagram &



Sons, Inc., a corporation, and its affiliates, engaged in distilling businesses as aforesaid, respectively, whereby and wherein for certain agreed hire and compensation to be paid plaintiff in said contracts mentioned and provided, the parties to said contracts respectively agreed that plaintiff should carry and transport by motor vehicles shipments and consignments of whiskies, alcoholic liquors and distilled spirits to be delivered by said contracting parties to plaintiff in Louisville, Jefferson County, Kentucky, consigned by said contracting parties for delivery to the consignees and purchasers of said whiskies, liquors and distilled spirits, in States other than the State of Kentucky, and particularly consigned for delivery to consignees and purchasers residing and located in States other than Kentucky, and consigned for delivery to such consignees and purchasers at the places of their respective residences, and particularly consigned for delivery to such consignees and purchasers residing and having their places of business in the City of Chicago, Cook County, State of Illinois.

Ever since the aforementioned dates of their respective execution, said contracts have been, and now are, in full force and effect, and pursuant to and in conformity with the terms and provisions of said contracts, and each of them, the plaintiff for compensation and hire has transported and carried from said City of Louisville, to said City of Chicago large and numerous quantities and loads of whiskies, alcoholic liquors and distilled spirits by motor vehicle sold and consigned by said Schenley Products Co. and said Joseph E. Seagram & Sons, Inc., and their aforesaid affiliates, to their respective purchasers, customers and consignees residing and doing business in said City of Chicago for delivery to said purchasers, customers and consignees in said City of Chicago. The aforementioned shipments and consignments were delivered by said Schenley Products Company, Inc., and said Joseph Seagram & Sons, Inc., and said affiliates, to plaintiff at said City of Louisville, consigned for direct and continuous carriage and transportation to said City of Chicago, and said shippers and consignors directed the plaintiff to carry and transport said consignments and shipments by continuous and uninterrupted carriage and transportation to the aforementioned purchasers and consignees in said City of Chicago, and plaintiff, in conduct-



ing its aforesaid business and in performing its aforementioned contracts did carry and transport said consignments and shipments by continuous and uninterrupted transport and carriage by motor vehicles and motor trucks from said City of Louisville to said consignees and purchasers in said City of Chicago. The direct, convenient and usual motor vehicle route from said City of Louisville to said City of Chicago is over a certain route, a portion of which lies between said City of Louisville and said City of Indianapolis, in the State of Indiana, known as U. S. Highway No. 31. The plaintiff's aforementioned transport and carriage operations conducted pursuant to the aforementioned contracts have been, and are, conducted between said City of Louisville and said City of Indianapolis en [fol. 8] route to said City of Chicago along and over said U. S. Highway No. 31, which Highway at all of the times herein mentioned continuously has been, and now is, a Federal Aid Highway, established and maintained under the laws of the Congress of the United States with the aid and assistance of funds and monies supplied and furnished by the Government of the United States.

At all of the times herein mentioned the business and operations conducted by plaintiff in the State of Kentucky have consisted solely and exclusively in the carriage and transportation by motor vehicle, pursuant to special contracts, of goods, wares and merchandise delivered to the plaintiff for carriage and transport, and by the plaintiff carried and transported, from the said City of Louisville to points and places in States other than Kentucky for delivery to persons residents of such other points and places, and in the further business of accepting delivery of such goods, wares and merchandise at points situated in places and States other than Kentucky for carriage and delivery by motor vehicle pursuant to special contracts, to persons residing and situated and doing business in said City of Louisville, and in delivering the same consistently with said undertakings of transport and carriage. At no time herein mentioned has the plaintiff carried any goods, wares or merchandise whatsoever or passengers whomsoever from any point in Kentucky for delivery to any other point or place situated in the State of Kentucky.

In the conduct of its aforementioned business of motor transportation and carriage of whiskies, liquors and dis-



titled spirits between said City of Louisville and said City of Chicago in the period subsequent to October 7, 1936, the plaintiff has realized net operating gains and profits in an amount exceeding \$20,000.00, and if allowed to continue to perform and carry out the contracts aforesaid [fol. 9] the plaintiff hereafter will realize net gains and operating profits in large and substantial amounts.

On or about the 30th day of September, 1935, and pursuant to the powers and authority conferred upon it by the Act of Congress in such cases made and provided, the Interstate Commerce Commission by its proper order extended until and including the 12th day of February, 1936, the period and time within which any contract carrier as defined in the Motor Carrier Act, 1935, or its predecessor in interest, which was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application should be made, might make application to said Interstate Commerce Commission for a permit to be issued by said Interstate Commerce Commission authorizing such contract carrier to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States. On July 1, 1935, and prior thereto; plaintiff was in bona fide operation as a contract carrier by motor vehicle as aforesaid over the route aforesaid from and between said City of Louisville and said City of Chicago, and elsewhere. Prior to the 12th day of February, 1936, and within the period of time extended as aforementioned, plaintiff duly and properly made, lodged and filed proper application in writing to and with said Interstate Commerce Commission for a permit to be issued by said Interstate Commerce Commission authorizing plaintiff to engage in the business of a contract carrier by motor vehicle in interstate commerce on any public highway within the territory and along the route specified in said application, which territory and routes, among others, included the aforesaid route between said City of Chicago and said City of Louisville [fol. 10] along and over the aforesaid U. S. Highway No. 31.

Said Motor Carrier Act, 1935, among other things and with respect to such application and the pendency and de-



termination thereof, provided and provides as follows, to-wit:

"Pending determination of any such application the continuance of such operation shall be lawful."

At all times subsequent to the aforementioned filing thereof, the aforesaid application lodged and filed by plaintiff as aforementioned with said Interstate Commerce Commission has been, and now is, pending before and undetermined by, said Interstate Commerce Commission.

In the conduct of so much of its aforementioned interstate business as penetrates the interior of the State of Kentucky, plaintiff, to avoid controversy, always earnestly has sought to submit to and to comply with any and all statutory enactments of the General Assembly of the Commonwealth of Kentucky, and even to submit to and comply with certain pretended enactments of said General Assembly which in application to the plaintiff's said interstate business transcended the powers, authority and competency of said General Assembly and were in contravention of and repugnant to the Constitution of the United States and therefore null and void.

In 1934 plaintiff made application to the Division of Alcoholic Control of the Department of Business Regulation of the Commonwealth of Kentucky that plaintiff be granted a special liquor transportation permit as provided in subsection "b" of Section 5, of Chapter 149 of the 1934 Acts of the General Assembly of Kentucky, [fol. 11] which Act was approved by the Governor of the Commonwealth of Kentucky on March 17, 1934, to engage in the transportation of distilled spirits within the State of Kentucky, and also to engage in the transportation of distilled spirits for import and export purposes, and paid to the Commonwealth of Kentucky the required fee incident to such application and the issuance of such permit, and in the year 1934 the aforesaid Division of Alcoholic Control granted said application and issued to the plaintiff a Special Liquor Transportation Permit and said permit so issued thereafter was renewed and continued in effect from year to year by said Division of Alcoholic Control in, to and for the years 1935, 1936, 1937, and to and including June 30, 1938, and for the first six months of the calendar year 1938, said privilege was evi-



denced by Special Liquor Transportation Permit No. 191, issued as aforesaid and held by plaintiff.

On or about May 20, 1937, and by appropriate instrument in writing executed for and in its behalf by its proper officers thereunto duly authorized and empowered, plaintiff executed, filed and lodged with the Secretary of State of the Commonwealth of Kentucky a certain instrument in writing designating Hennessy Basch, of Louisville, Kentucky, the agent of the plaintiff upon whom process might and may be served in any action instituted and brought against the plaintiff in the Commonwealth of Kentucky, and paid to the said Secretary of State the filing fee incidental to and exacted and required upon the filing of such designation.

Shortly prior to July 27, 1936, plaintiff made appropriate application to the Department of Motor Transportation of the Kentucky State Tax Commission of the Commonwealth of Kentucky for a permit to transport whiskey and distilleries' supplies, and on July 27, 1936, said Department of Motor Transportation issued to the plaintiff Permit No. 445, dated July 27, 1936, stating and specifying that plaintiff having complied with the laws and with [fol. 12] the regulations of said Commission, a permit was thereby granted to the plaintiff to transport whiskey and distilleries' supplies.

None of the permits, certificates and licenses hereinbefore mentioned ever has been revoked or cancelled.

At all times subsequent to its incorporation and organization as aforementioned, plaintiff continuously has been engaged as a contract carrier by motor vehicle as aforementioned along and over the aforesaid route between said City of Louisville and said City of Chicago, and ever since the execution of the aforementioned contracts with the aforesaid distillers the aforementioned carriage and transportation of whiskies, alcoholic liquors and distilled spirits pursuant to said contract has constituted the major and principal portion of the business conducted by plaintiff as a contract motor carrier between said City of Louisville and said City of Chicago along and over the route hereinbefore specified.

None of Plaintiff's aforementioned operations penetrating into the interior of the State of Kentucky has been conducted elsewhere in said State than within the limits of a city or incorporated town, or between such city or



town and points within ten miles of the limits thereof in instances where the same is a city of the first, second, third or fourth or fifth class, or elsewhere than within five miles of the limits of such incorporated town in instances where such incorporated town is one of the sixth class, all as defined and prescribed by the Kentucky Statutes in such cases made and provided (Carroll's Ky. Stats. Sec. 2739j-94).

For a period exceeding one year next preceding July 1, 1938, plaintiff owned, used and employed, and now owns, not less than 7 motor trucks and units of automotive equipment and operated not less than 25 motor trucks, and employed not less than an average of 40 men in the conduct [fol. 13] of its aforementioned business of transporting whiskies, alcoholic liquors and distilled spirits between the said City of Chicago and said City of Louisville and over and along the aforesaid Federal Aid Highway. For more than a year preceding July 1, 1938, plaintiff's capital investment in said trucks and equipment was, and now is, a sum and amount exceeding \$10,000.00.

Each and all of the aforementioned acts and operations of carriage and transportation conducted by plaintiff as aforesaid have been necessarily incidental to the sales and purchases of alcoholic whiskies, liquors and distilled spirits, sold for delivery to purchasers residing and situated in a State other than that of the State in which the producer, manufacturer and seller resided and was situated, and under contracts of sale and delivery requiring the delivery of such merchandise to the purchasers thereof at such purchasers' aforementioned places of residence and business, and each and all of plaintiff's aforementioned operations of carriage and transportation constituted, were, and are, commerce among the several States.

The 1938 General Assembly of the Commonwealth of Kentucky assumed and pretended to enact a certain pretended statute known as and called "Alcoholic Beverage Control Law", being Chapter 2 of Acts of 1938 Special Session of the General Assembly of Kentucky, Carroll's Ky. Stats., Sec. 2554b-97, et. seq., entitled:

"An Act providing for the regulation of the manufacture of and traffic in alcoholic beverages; requiring licenses therefor and fixing the amounts of license fees; creating Kentucky State Alcoholic Beverage Control Board, with



appropriate powers for the enforcement of this Act; fixing the compensation of members of said Board and employees to be appointed by it; authorizing the issuance, revocation, and suspension of licenses; imposing prohibitions, restrictions and regulations and fixing penalties for violations of this Act; empowering counties, and cities of the first, second [fol. 14] and third classes, to have alcoholic beverage administrators with appropriate powers to adopt and enforce restrictions and regulations of the alcoholic beverage traffic in such city or county, in conformity with this Act; to issue local licenses and fix the fees therefor, to revoke same, and to impose local regulations and penalties, not inconsistent with this Act; transferring the functions and resources of the Division of Alcoholic Control in the Department of Business Regulation to the Department of Revenue; repealing certain sections of Carroll's Kentucky Statutes, 1936 edition, and all inconsistent laws; and declaring an emergency to exist."

On March 7, 1938, said pretended Act was signed and approved by Honorable Albert B. Chandler, the duly elected, qualified and acting Governor of the Commonwealth of Kentucky.

Among other things said Alcoholic Beverage Control Law, pretends and assumes to provide as follows:

"§ 3. Functions.—The administration of this Act and the regulation of the traffic in alcoholic beverages in this Commonwealth is hereby vested in the Department of Revenue."

"§ 4. Organization.—(a) The administration of this Act in relation to traffic in distilled spirits and wine shall be in charge of a distilled spirits unit, under the supervision of the Commissioner of Revenue. (b) The administration of this Act in relation to traffic in malt beverages shall be in charge of a malt beverage unit, under the supervision of the Commissioner of Revenue."

"§ 5. Administrators: Salaries.—The distilled spirits unit and the malt beverage unit shall each be headed by an Administrator appointed by the Commissioner of Revenue. The salaries of said Administrators shall be fixed by the Commissioner of Revenue in accordance with Section 4618-154 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition, and they shall be exempt from the test pro-



vided for in Section 4618-90. (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition."

"§ 6. Powers and Duties of Administrators.—The Administrators, subject to the supervision and control of the Commissioner, shall exercise severally any of the functions, powers and duties conferred upon the Department by law, which the Commissioner may delegate to them. The Administrator of the distilled spirits unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in distilled spirits and wine; and the Administrator of the malt beverage unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in malt beverages."

"§ 7. Alcoholic Beverage Control Board; Creation; Functions; Limitations.—The Kentucky Tax Commission shall constitute the Alcoholic Beverage Control Board, which shall have the following functions, powers and duties:

(1) To adopt reasonable regulations governing the conduct of its own business and the procedure relative to applications for and revocations of licenses and relative to all other matters over which the Board is given jurisdiction by this Act, and for the supervision and control of the manufacture, sale, transportation, storage, advertising, and trafficking of alcoholic beverages throughout the Commonwealth. Such rules and regulations need not be uniform in their application, but may vary in accordance with reasonable classifications.

(2) To limit in its sound discretion the number of licenses of each kind or class to be issued in this Commonwealth or within any political subdivision thereof, and to restrict the locations of licensed premises. To this end the Board may divide and subdivide this Commonwealth or any political subdivision thereof into sections or districts, provided the classification be reasonable, and the rules and regulations relating to the granting, refusal and revocation of licenses may be different within the several divisions or subdivisions so created."

"§ 9. Powers of Members, Officers and Employees.—The Administrators and all Field Representatives shall have full police powers such as are now vested in sheriffs and other peace officers, provided the jurisdiction of said Admin-



Administrators and Field Representatives shall be coextensive with the boundaries of the Commonwealth. They shall have authority to inspect or examine any premises where alcoholic beverages are manufactured, sold, stored or otherwise trafficked in, without first having obtained a search warrant; and shall have authority to confiscate any contraband property."

§ 13. Legal Counsel for Board.—The Attorney General of this Commonwealth shall, subject to the approval of the Commissioner of Revenue, appoint an additional assistant Attorney General whose sole duty shall be to act as legal counsel for the distilled spirits unit and the malt beverage unit. The Assistant Attorney General appointed under this section shall be paid from the Department of Revenue appropriation, an annual salary not to exceed four thousand dollars."

[fol. 16] "§ 18. Expiration Date of Licenses; License Taxes.—All licenses issued under this Act shall expire on June 30th of each year. There shall be the following kinds of licenses, each of which shall be printed so as to be readily distinguishable from each other, to wit: \* \* \*

(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum."

"§ 27. Business Authorized Under a Transporter's License.—A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case are authorized by law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be."

"§ 33. Applications for Licenses; Issuance of Same.—Applications for any license provided for in section 18 of this Act shall be made to the Administrator of the Distilled Spirits Unit at his office in Frankfort, Kentucky; shall be in writing on forms furnished by the Department of Revenue, and verified; and shall set forth in detail such information concerning the applicant and the premises for which the license is sought as this Act or the State Board shall by regulation require. Said application shall be accompanied by a certified check, or cash, or a postal or express money



order for the amount of money required by this Act for a license of the kind applied for. If the Administrator shall grant the application he shall issue the proper license in such form as shall be determined by the State Board by regulation, subject to the provisions of section 38 of this Act. No license except those provided in sub-sections 6 and 8 of section 29 of this Act shall be issued in less than twenty days or delivered in less than thirty days from the time the application and remittances were received by the Department of Revenue."

"§ 52. No traffic in Alcoholic Beverages Save Under License.—It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport, or otherwise traffic in alcoholic beverages without first [fol. 17] having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said person shall be required to pay said license for the full year notwithstanding that no license shall be issued together with a penalty equal to twenty (20) per cent of said license tax."

"§ 53. Declaring Certain Property Contraband: Providing for Its Disposition.—The following property is hereby declared to be contraband;

• • • • •

(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act.

• • • • •

(6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages.



Any peace officers, including the Administrators, and field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Control Board, subject to the right of any owner or lienor of property in sub-section six above, whose lien is of record to intervene and establish his rights in such property by providing that the property was being used in connection with traffic in alcoholic beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being bona fide shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as contraband in connection with the arrest of the defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board."

[fol. 18] "§ 54 (7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

"§ 89. Transportation by Non-Licensee Prohibited; Exception.—No person except a railroad company or railway express company shall transport or cause to be transported



any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."

"§ 94. Penalties for Trafficking in Alcoholic Beverages Without a License.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction, shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than \$500.00 and not to exceed \$10,000.00 or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

"§ 95. Penalties for Violations of Other Sections of this Act.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this Act other than section 52 or sections 104 to 117 inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail or workhouse for a term not to exceed six months, or by both such fine and imprisonment. For a second and each subsequent violation of the provisions of any section of this Act other than section 52, whether the section violated be that for which the first conviction was had or not, the offender, upon conviction, shall be punished by a fine not to exceed \$1,000 or by imprisonment for a term not to exceed one year, or by both such fine and imprisonment. The penalties provided for in this section shall be in addition to the [fol. 19] revocation of the offender's license; provided, that in case the offender be a corporation joint stock company, association or fiduciary, then the principal officer or officers



responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 10 of this Act."

"§ 119. Transfer of Functions and Resources of Division of Alcoholic Control from the Department of Business Regulation to the Department of Revenue.—The functions of the Division of Alcoholic Control of the Department of Business Regulation are hereby transferred to the Department of Revenue. All books, papers, records, files, office equipment, other property and pending business of the said division are likewise transferred to and vested in the Department of Revenue. All employees whose functions are by this Act transferred to and vested in the Department of Revenue are hereby transferred, with their functions, to the said department. The remainder of the appropriation made for the operation of the Division of Alcoholic Control is hereby transferred to and vested in the Department of Revenue to be used for the administration of this Act. In connection with the transfer of the functions of the Division of Alcoholic Control of the Department of Business Regulation to the Department of Revenue, the said Department of Revenue shall be in every way the successor with respect to such functions, and to every act done in the exercise of such functions by or under the authority of the said division. In every instance in which the said division is referred to or designated in any law (not hereby repealed), contract or document, such reference or designation shall be deemed to refer to the Department of Revenue."

"§ 123. Declaring an Emergency.—The present uncertainty with respect to the law governing the sale, distribution and use of alcoholic beverages constitutes an emergency, and this Act shall become a law and be effective on its passage and approval by the Governor. Provided, however, that section 70 of this Act shall become effective as provided by the Constitution of Kentucky in the absence of a declaration of emergency; and provided further, that nothing in this Act shall be construed to require any licensee engaged in traffic in alcoholic beverages to pay any additional license tax, or procure any license hereunder, prior to the procurement of the license for the fiscal year 1938-39."



[fol. 20]<sup>3</sup> From and after the aforesaid approval of said pretended Alcoholic Beverage Control Law and consistently and conformably with the terms and provisions thereof as written, it became incumbent and mandatory upon plaintiff from and after July 1, 1938, to be the holder of the certain license to transport distilled spirits mentioned in Section 18 of said pretended Act if the plaintiff were to continue to conduct its aforementioned business under and pursuant to its aforesaid contracts with the aforementioned distillers and with other persons similarly situated and if plaintiff and plaintiff's officers were not to be exposed to the infliction of the penalties assumed to be provided and specified by the aforesaid pretended Act, and if the whiskies, liquors and distilled spirits in course of transportation and carriage in interstate commerce as aforementioned, and the motor vehicles bearing the same, were not to be exposed to seizure as contraband and to confiscation as provided in and by said pretended Act.

On or about June 4, 1938, in order to avoid controversy with law enforcement officers of the Commonwealth of Kentucky and on a printed form prepared and furnished by the Division of Motor Transportation of the Commonwealth of Kentucky, plaintiff made written and sworn application in proper form to said Division of Motor Transportation that plaintiff be granted a Common Carrier's Truck Certificate to operate a motor freight line from Louisville, Jefferson County, Kentucky, to the Indiana State line in interstate carriage only and along and over aforesaid U. S. Highway No. 31. With said application plaintiff tendered and delivered and paid to said Division of Motor Transportation the required payment of \$25.00. On June 23, 1938, in the new Capitol Building at Frankfort, Kentucky, and pursuant to proper notice theretofore given by him to all interested parties, the Honorable D. C. Moore, Director of said Division of Motor Transportation, held a hearing upon said [fol. 21] application. Upon said hearing plaintiff expressly stated and disclosed that its business and operations were not those of a common carrier by motor truck but that its business and operations were those of a contract motor carrier, and that plaintiff sought and applied for said common carrier's truck certificate merely to render it eligible to receive the aforementioned Liquor Transporter's License provided for in the aforesaid pretended Alcoholic Beverage Control Law. Pursuant to said hearing of said application



for a Common Carrier's Truck Certificate, said D. C. Moore, Director as aforesaid, determined and decided that plaintiff was not eligible to receive a Common Carrier's Truck Certificate, and on or about June 30, 1938, said D. C. Moore, Director as aforesaid, entered and filed an order and decision denying and dismissing plaintiff's said application for said Common Carrier's Truck Certificate, and thereby rendered plaintiff ineligible to obtain or receive the Liquor Transporter's License aforementioned.

In order to avoid controversy with law enforcement officials of the Commonwealth of Kentucky as aforementioned, and on a printed form supplied by the Department of Revenue of the Commonwealth of Kentucky and on May 25, 1938, plaintiff made and executed signed and sworn application, in writing and in proper form, to the Department of Revenue of the Commonwealth of Kentucky to be granted the certain license to transport distilled spirits and wine mentioned and prescribed in the aforesaid pretended Alcoholic Beverage Control Law. On June 7, 1938, plaintiff lodged and filed said application with said Department of Revenue and simultaneously therewith paid to said Department of Revenue the required fee for said license in the amount of \$10.00, likewise filed and lodged with said Department of Revenue the required bond duly executed dated May 31, 1938, whereby and wherein plaintiff as principal, and Standard Accident Insurance Company, of Detroit, Michigan, as surety, bound themselves in the sum of One Thousand Dollars (\$1,000.00) that the plaintiff would not suffer or permit any violation of the provisions of said Alcoholic Beverage Control Law as it may be amended or of regulations issued pursuant thereto, and that in the event of any such violation that all fines and penalties which shall accrue during the time that the said license so applied for should be in effect shall be paid, together with all costs taxed or allowed in any proceeding brought or instituted for violating any of the provisions of said Alcoholic Beverage Control Law, and simultaneously therewith plaintiff tendered and filed with said Department of Revenue the required affidavit of F. J. Wolke, Manager of the Dispatch Room of the Courier Journal, a daily newspaper of general circulation in Louisville, Jefferson County, Kentucky, which affidavit states that on June 2, 1938, and June 6, 1938, there was published in said newspaper's issues of said dates the notice required by said Alcoholic Beverage Control Law that



plaintiff intended to apply for the aforesaid license to transport distilled spirits. On June 2, 1938, and June 6th, 1938, plaintiff advertised its intention to apply for the last mentioned license by inserting in the aforementioned newspaper, which, prior thereto long had been, then was, ever since has been, and now is, a newspaper of general circulation in said Jefferson County, in the State of Kentucky, notice of plaintiff's intention to apply for said last mentioned license as aforementioned by inserting in said mentioned issues of said newspaper a concise advertisement stating the name and address of the plaintiff, and the names and addresses of the principal officers and directors of the plaintiff, and that application would be made for the type of license aforesaid. To the last mentioned application and affidavit there was attached at the time of the aforesaid delivery and filing thereof a newspaper clipping of the aforesaid advertisement published as aforesaid.

[fol. 23] On or about July 8, 1938, said Department of Revenue, said William E. Baxter, Acting Distilled Spirits Administrator as aforesaid, and said James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, said Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, and said C. M. C. Porter, Member of Kentucky State Alcoholic Beverage Control Board, denied and refused to grant to plaintiff said last mentioned Liquor Transporter's license; and on July 14, 1938, said James W. Martin, Commissioner of Revenue as aforesaid, by writing dated July 8, 1938, notified plaintiff of said denial and refusal, and said notice was the first notice received by plaintiff of said denial and refusal.

By reason of said last mentioned denial and refusal, and conformably with the ostensible and pretended provisions of said pretended Alcoholic Beverage Control Law, plaintiff apparently is ineligible and disqualified to transact and conduct its aforesaid interstate contract carrier business as a carrier of whiskies, alcoholic liquors and distilled spirits, and if plaintiff undertakes the carriage and transportation of such commodities as aforementioned, it will render itself, its officers, its employees engaged in such transportation, the shipments of such commodities carried by it, and the motor vehicles transporting such commodities,



liable to the infliction of the penalties assumed to be provided by said pretended law.

[fol. 24] On several days and occasions on and subsequent to July, 1938, defendants have threatened to enforce, and unless enjoined and restrained by this Court will attempt to enforce, the aforementioned penal, criminal and confiscatory provisions of the aforesaid pretended Alcoholic Beverage Control Law against the plaintiff, against plaintiff's officers, against shipments of whiskies, liquors and distilled spirits being transported in interstate commerce by plaintiff as aforesaid and against the motor vehicles owned and operated by plaintiff carrying said shipments, and on several days and occasions on and subsequent to July 1, 1938, defendants have threatened, and now threaten, to seize as contraband and to confiscate shipments of liquors and distilled spirits transported and carried by plaintiff in interstate commerce as aforementioned over and along aforesaid U. S. Highway No. 31 and between said City of Louisville and said City of Chicago, and similarly to seize and confiscate the plaintiff's motor trucks transporting such cargoes, in the event that plaintiff continues to carry and transport such consignments of whiskies, liquors and spirits in transit in interstate commerce as aforesaid pursuant to performance of plaintiff's aforesaid contracts with the aforesaid distillers and like contracts with other persons similarly situated.

At all times subsequent to July 1, 1938, the aforementioned distillers and other persons with whom plaintiff has contracts like and similar to those hereinbefore identified and described, have entertained, and now entertain, fear and apprehension that if they deliver whiskies, liquors and spirits as aforesaid to the plaintiff for carriage and transportation in interstate commerce over the aforesaid route as aforementioned, the said cargoes and consignments will be seized and confiscated by defendants and the law enforcement officers of the Commonwealth of Kentucky under and pursuant to the terms, provisions and prohibitions of the aforesaid pretended Alcoholic Beverage Control Law, and in consequence of said apprehension and the fear that the said consignments and cargoes of whiskies and liquors will be seized and confiscated as aforementioned the aforementioned distillers and other similarly situated customers of plaintiff have declined and refused, and now decline and refuse, to do further business of the character mentioned



with plaintiff and have refused and declined, and now refuse and decline, to deliver and entrust to plaintiff for interstate transportation and carriage along and over the route aforesaid any consignment or shipment of liquors, whiskies or distilled spirits whatsoever. Defendants' aforementioned threats have intimidated the aforementioned distillers and plaintiff's other aforementioned customers and have caused and coerced said distillers and said customers to refrain from doing and transacting business with plaintiff as aforementioned, have substantially interfered with and done damage to plaintiff's aforesaid advantageous contractual relations with said distillers and said other customers, and if said threats are continued plaintiff's aforesaid business [fol. 26] of a contract carrier by motor vehicle of whiskies, liquors and distilled spirits in interstate commerce along and over the route hereinbefore specified will be destroyed, the value of said business and plaintiff's aforesaid investment therein will be lost and destroyed, no further profit will accrue to the plaintiff from said business and investment, to the plaintiff's damage in an amount exceeding \$75,000.00.

Inevitable, immediate, irreparable and great loss and damage heretofore have been inflicted upon plaintiff by defendants' said threats, and further losses and damages as aforesaid will be inflicted upon and suffered by the plaintiff in the event the aforesaid threats of enforcement of said pretended Alcoholic Beverage Control Law are continued by defendants, said loss and damage are not susceptible of definite measurement, ascertainment or statement in pecuniary terms.

In application to the plaintiff in the conduct of its aforesaid interstate contract motor carrier business along and over the interstate route hereinbefore specified said Alcoholic Beverage Control Law and its aforementioned pretended terms and provisions are, and each of them is, unconstitutional, null and void, in that the same contravene and are repugnant to, and each of them contravenes and is repugnant to, the Commerce Clause and the Due Process Clause of the Constitution of the United States as amended, and in that said pretended Act and the several aforementioned provisions thereof assume and undertake to deprive this plaintiff of its aforementioned property without due process of law and in that the same assume and undertake



to regulate, to burden, to obstruct and to prohibit commerce among the several States as aforesaid.

[fol. 27] The plaintiff cannot maintain an action for the recovery of said damages against the sovereign State of Kentucky. The plaintiff is without adequate or any remedy at law in the premises.

The defendants, Hubert Meredith, Attorney General as aforesaid, and Harry D. France, Assistant Attorney General as aforesaid, and William E. Baxter, Acting Distilled Spirits Administrator, as aforesaid, are, and each of them is, charged by law with the duty to prosecute all violations of said pretended Alcoholic Beverage Control Law and to cause appropriate proceedings to be commenced and prosecuted in the proper Court without delay for the enforcement of the penalties provided in said pretended Alcoholic Beverage Control Law and to seize and confiscate as contraband all distilled spirits, whiskies and alcoholic liquors transported in contravention of the pretended terms and provisions of said pretended Alcoholic Beverage Control Law, and unless restrained and enjoined by this Court from so doing said defendants intend, threaten to, and will cause criminal proceedings to be commenced and prosecuted for the enforcement of the aforesaid penalty against the plaintiff and its officers and will seize and confiscate any and all distilled spirits, liquors and whiskies which the plaintiff may undertake to carry and transport as a contract motor carrier engaged in interstate commerce along and over the route hereinbefore specified, and will seize and confiscate all of plaintiff's motor vehicles engaged in so transporting the same. Unless this Court shall determine the invalidity and unconstitutionality of said pretended Act in this proceeding plaintiff will be compelled to submit to said pretended Act whether the same be valid or invalid and plaintiff thereby will be deprived of its property without due process of law and will be denied the right and privilege to engage in interstate commerce among the several states as [fol. 28] aforementioned, in contravention of the 14th Amendment to the Constitution of the United States, and in contravention of Article I, Sec. 8, Clause 3 of the said Constitution.

Great, immediate and irreparable loss, injury and damage as aforesaid will result to plaintiff before this cause can be heard on notice.



Wherefore, the plaintiff, Ziffrin, Incorporated, prays that a temporary restraining order and that preliminary and permanent and perpetual injunctions be adjudged, decreed, granted, entered and issued, enjoining and restraining the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, their successors, assistants, deputies and agents, from bringing, and from threatening to bring, either directly or indirectly, and from permitting to be brought, either directly or indirectly, any civil criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing the aforesaid pretended Alcoholic Beverage Control Law, or any provision thereof, against the plaintiff, its officers, representatives, agents or employees, or any of them, from seizing or confis- [fol. 29] cating, and from attempting and from threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic liquors whatsoever carried and transported by plaintiff as a contract motor carrier for hire between the City of Louisville, Kentucky, and the City of Chicago, Illinois, or to points and places intermediate said two Cities along and over the Federal Aid Highway known as U. S. Highway No. 31, and from seizing or confiscating, and from attempting and threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them, and from causing, and from threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested for violating any provision of said pretended Alcoholic Beverage Control Law, and from taking, and from threatening to take, any other action in any manner to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives and employees, or any of them, in conducting the aforesaid operations of transport



and carriage, or any of them; prays further that the defendants, their successors, assistants, deputies, and each of them, be ordered restrained and enjoined as aforesaid by preliminary injunction issued herein during the pendency of this cause; prays further than an order to show cause issue herein upon application of the plaintiff directed to defendants requiring them to show cause why a preliminary injunction should not issue as aforesaid; prays further that a temporary restraining order issue herein pending the hearing of said order to show cause why a preliminary injunction should not be issued and granted herein; prays further that upon the hearings aforesaid the said pretended Alcoholic Beverage Control Law be adjudged, declared and held to be unconstitutional, illegal and void, and that a perpetual and permanent injunction be granted and issued restraining the enforcement of said pretended Act as herein- [fol. 30] above prayed for; prays further for its costs herein incurred and expended, and for other general and equitable relief to which it may appear to be entitled.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenebaum, Howell Ellis, Attorneys for Plaintiff.

*Duly sworn to by Sam Ziffrin. Jurat omitted in printing.*

[fol. 31] IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT--Filed July 18, 1938

The plaintiff, Ziffrin, Incorporated, before answer filed and by leave of Court amends its Bill of Complaint this day filed herein and for such amended Bill of Complaint against each and all of the defendants named in the original Bill of Complaint herein states as follows:

In application to the plaintiff in the conduct of its interstate contract motor carrier business of carrying and transporting whiskies, alcoholic beverages and distilled spirits along and over the certain route and U. S. Highway No. 31 all mentioned, described and identified in said original Bill of Complaint, the said pretended Alcoholic Beverage Control Law identified in said original Bill of Complaint and the several pretended terms and provisions thereof mentioned and quoted in said original Bill of Complaint are, and each of them is, unconstitutional, null and void in that the



same contravene and are repugnant to, and each of them contravenes and is repugnant to, the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States in that said pretended Alcoholic Beverage Control Law and the aforesaid terms and provisions thereof assume and undertake to deny to this plaintiff the equal [fol. 32] protection of the laws in that they permit and allow common carriers of goods, wares and merchandise to do and transact business of the kind and character aforesaid and assume and undertake to deny the right and privilege of doing and transacting such business to contract carriers, this plaintiff included, and in that the aforementioned distinction and discrimination between such common carriers and such contract carriers, this plaintiff included, is not justified by any real or substantial difference whatever between carriers of the two mentioned kinds and varieties or by any reasonable relation whatever to any supposed subject or object of said pretended legislation.

Plaintiff reiterates and reaffirms each and all of the allegations contained in said original Bill of Complaint.

Wherefore, the plaintiff, Ziffrin, Incorporated, prays judgment and a decree and interlocutory relief against the aforementioned defendants, and each of them, as prayed in said original Bill of Complaint herein, for its costs herein incurred and expended, and for all other general and equitable relief to which plaintiff may appear to be entitled.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenebaum, Howell Ellis, Attorneys for Plaintiff.

[fol. 33] IN UNITED STATES DISTRICT COURT

SUBPOENA IN EQUITY—Returned and filed July 19, 1938

The President of the United States of America to James W. Martin, Commissioner of Revenue of the Commonwealth of Ky., Member of Ky. Tax Commission and Member of Ky. State Alcoholic Beverage Control Board; Emory G. Dent, Member of Ky. Tax Commission and Member of Ky. State Alcoholic Beverage Control Board; C. M. C. Porter, Member of Ky. Tax Commission and Member of Ky. State Alcoholic Beverage Control Board; William E. Baxter, Acting Distilled Administrator of Ky. State Alcoholic Beverage Control Board; Hubert Mere-



dith, Attorney General of the Commonwealth of Kentucky; and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Eastern — of Kentucky, at Frankfort, Kentucky to answer unto the bill of complaint and an amended bill of complaint both filed this day by Ziffrin, Incorporated, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable H. Church Ford, United States District Judge at Frankfort, this 18th day of July, A. D. 1938.

A. B. Rouse, Clerk, by Sara M. Caden, Deputy Clerk.  
(Seal.)

#### Memorandum

The Defendant in this case — required to file — answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Received this writ at Lexington, Ky. on July 18, 1938 and on the same day executed same by serving a true copy of the within writ on James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of the Ky. State Tax Commission and Member of the Ky. State Alcoholic Beverage Control Board; Emory G. Dent, & C. M. C. Porter, Members of Ky. Tax Commission and Members of Ky. State Alcoholic Beverage Control Board; William E. Baxter, Acting Distilled Spirits Administrator of Ky. Alcoholic Beverage Control Board, and Hubert Meredith, Attorney General of the Commonwealth of Kentucky, at Frankfort, Franklin County, Kentucky. Returned unexecuted as to Harry D. France; not found in this bail-wick; said to be in Louisville, Ky.

J. M. Moore, U. S. Marshal, by R. A. Gayle, Chief Deputy.

Fee	10.00
Cost	1.68
	<hr/> 11.68



[fol. 34] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—Returned and filed July 19, 1938

The defendant, Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, is hereby notified that at 10:00 A. M. on the 19th day of July, 1938 and in the Court rooms of the United States District Court for the Eastern District of Kentucky, located and situated in the Federal Building in the City of Lexington, Fayette County, State of Kentucky, or as soon thereafter as it may be heard, the plaintiff, Ziffrin, Incorporated, will appear by counsel before the Honorable Mac Swinford, United States District Judge for the Eastern and Western Districts of Kentucky, and then and there and in the above entitled cause will move the said Court and Judge to grant plaintiff a temporary restraining order, restraining the defendants named in the Bill of Complaint in said cause and each of them conformably with the prayer of the said Bill of Complaint.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenbaum, Howell Ellis, Attorneys for Plaintiff.

MARSHAL'S RETURN

Received this writ at Louisville, Ky. on July 18, 1938 and on July 18, 1938 at Louisville, Ky., served the within named Harry D. France, Asst. Attorney General of the Commonwealth of Kentucky and left a true copy thereof with the person named above.

L. E. Cranor, U. S. Marshal, by H. W. Milligan, Deputy.

[fol. 35] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—Returned and Filed July 19, 1938

The defendants, James W. Martin; Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky



State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, are, and each of them is, hereby notified that at 10 o'clock A. M. on the 19th day of July, 1938, and in the Court Rooms of the United States District Court for the Eastern District of Kentucky, situated in the City of Lexington, Fayette County, State of [fol. 36] Kentucky, or as soon thereafter as it may be heard, the plaintiff, Ziffirin, Incorporated, will appear by counsel before the Honorable Mac Swinford, United States District Judge for the Eastern and Western Districts of Kentucky, and then and there and in the above entitled cause will move the said Court and Judge to grant plaintiff a temporary restraining order restraining the defendants, and each of them, conformably with the prayer of the Bill of Complaint in said cause.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenbaum, Howell Ellis, Attorneys for Plaintiff.

#### MARSHAL'S RETURN

Received this notice at Lexington, Ky., on July 18, 1938, and on the same day executed same by serving a true copy of the within writ on James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent and C. M. C. Porter, Members of the Kentucky Tax Commission and Kentucky State Alcoholic Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky. Returned unexecuted as to Harry D. France; not found in this bailwick; said to be in Louisville. Executed on Wm. E. Baxter, at Frankfort, Franklin County, Kentucky.

J. M. Moore, U. S. Marshal, by R. A. Gayle, Chief Deputy.



[fol. 37] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed July 19, 1938

Comes plaintiff, Ziffin, Incorporated, by Counsel, and moves the Court,

(1) That the filing on July 18, 1938, of plaintiff's amended bill of complaint be noted of record and that said amended bill be made part of the record herein, and further moves the Court upon plaintiff's bill of Complaint as amended herein.

(2) That a temporary restraining order be granted against the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, pending the hearing and decision of plaintiff's motion for a preliminary and temporary injunction, enjoining the defendants, and each of them, conformably with the prayer of the Bill of Complaint herein.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenbaum, Howell Ellis, Attorneys for Plaintiff.

[fol. 38] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER—Entered and Filed July 19, 1938

This matter coming on to be heard at Lexington at 10:00 o'clock A. M., on Tuesday, July 19, 1938, plaintiff being represented by counsel and the defendants being present in court and by counsel, the court being sufficiently advised is of the opinion that there is danger of immediate and irreparable injury, loss and damage to the plaintiff incident to



delay in serving the necessary notice and the fixing of the time of the hearing for a Three Judge Court,

Now, Therefore, the Court being sufficiently advised, it is hereby ordered and decreed that the aforesaid motions be and the same are, and each of them is, hereby sustained, and

[fol. 39] (1) That the filing on July 18, 1938, of plaintiff's amended Bill of Complaint in the office of the Clerk of this Court, be and the same is hereby noted of record, and said amended Bill of Complaint is hereby made part of the record herein, and

(2) That the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, and the successors, assistants, deputies and agents of said defendants, and each of them, be, and they are, and each of them is, hereby temporarily restrained and enjoined—on the ground or for the reason, that there has not been issued to the plaintiff, and plaintiff does not hold or possess, a liquor transporter's license of the Kentucky State Alcoholic Beverage Control Board—from bringing, and from threatening to bring, either directly or indirectly, and from permitting to be brought, either directly or indirectly, any civil, criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing the Alcoholic Beverage Control Law enacted by the General Assembly of the Commonwealth of Kentucky at a Session thereof held in the year 1938, or any provision thereof, against the plaintiff, its officers, representatives, agents or employees, or any of them, from seizing or confiscating, and from attempting and threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic liquors, whatsoever, carried and transported by plaintiff as a motor carrier between the City of



[fol. 40] Louisville, Jefferson County, Kentucky, and the City of Chicago, Cook County, Illinois, or to points and places intermediate said two cities along and over U. S. Highway No. 31, and from seizing or confiscating, and from attempting and threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them, and from causing, and from threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested for violating any provision of said Alcoholic Beverage Control Law, and from taking, and from threatening to take, any other action in any manner to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives and employees, or any of them, in conducting the aforesaid operations of transport and carriage, or any of them.

This temporary restraint is on condition that a bond be filed herein in the penal sum of \$5,000.00, executed by the plaintiff as Principal, and with good and sufficient surety thereon, approved by the Clerk of this Court, which bond shall be conditioned that the plaintiff will pay to the defendants all costs, losses and damages which may result from the issuance of said temporary restraining order if it should be finally determined that the same was improperly issued, or that may be awarded to defendants by reason of the granting of said order.

It is further and hereby ordered that the defendants appear before the District Court of the United States for the Eastern District of Kentucky, at a session thereof to be held in the Court Room of said Court in the City of Louisville, State of Kentucky, by agreement of parties, at 1:30 o'clock, P. M. on the 26th day of July, 1938, then and there to show [fol. 41] cause, if any there may be why the preliminary injunction prayed in the Bill of Complaint as amended herein should not issue, and the said defendants and the Honorable Albert B. Chandler, Governor of the Commonwealth of Kentucky, are, and each of them is, hereby notified of said hearing.

It is further ordered that the aforesaid defendants, he, and they are, and each of them is, hereby restrained as heretofore set forth until the further order of this Court.

It is further and hereby ordered that a copy of this order, certified under the hand of the Clerk and the seal of this Court, be served upon each of the defendants, and upon the



Honorable Albert B. Chandler, Governor of the Commonwealth of Kentucky; that a copy of the writ issued hereon shall be published in the Louisville Times, a newspaper published in Louisville, Jefferson County, Kentucky, and that this order shall be binding upon all persons who have knowledge of the contests and purport thereof:

To the foregoing rulings the defendants are granted exceptions.

This order signed and issued this 19th day of July, 1938, at 1:00 o'clock P. M.

(S.) Mac Swinford, Judge.

Certified. A. B. Rouse, Clerk, by J. A. Bodkin, D. C.  
(Seal.)

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER CONVENING THREE-JUDGE COURT—Entered and Filed  
July 19, 1938.

Preliminary injunction having been granted in this case, and it appearing to the Court from the Bill of Complaint, that it is necessary to convene a Three-Judge Court; the Court called to his assistance the Hon. Elwood Hamilton, Circuit Judge and the Hon. Robert R. Nevin, District Judge, and this case is set down for hearing at Louisville, Ky., on Tuesday, July 26, at 1:30 P. M., 1938.

Mac Swinford, Judge.

IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING JUDGE—Entered and Filed July 19, 1938.

It having been made to appear to me that the public interest so requires, I do hereby designate and appoint the Honorable Robert R. Nevin, United States District Judge for the Southern District of Ohio, to hold the United States District Court for the Eastern District of Kentucky, in any of the divisions thereof, in place of or in aid of or with the regular judge of such Eastern District. Such designation and appointment are to continue in full force and effect during the pendency, trial and conclusion of the case of



Ziffin, Incorporated, vs. James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; William E. [fol. 43] Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board; Hubert Meredith, Attorney General of the Commonwealth of Kentucky and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and the judge so designated is to have all the powers and be subject to all the duties contemplated by Sections 14, 18, 19 and 226 of the Judicial Code as now amended being Sections 18, 22, 23 and 380, Title 28, U. S. C. A.

Dated at Louisville, Kentucky, July 21, 1938.

Elwood Hamilton, Presiding Circuit Judge, Sixth Judicial Circuit.

#### IN UNITED STATES DISTRICT COURT

MARSHAL'S RETURN ON CERTIFIED COPY OF RESTRAINING ORDER  
—Returned and Filed July 25, 1938.

Received this order at Lexington, Ky., on July 20, 1938 and on July 21, 1938 executed same by serving a true copy of the within writ on James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Ky. Tax Commission and Member of the Ky. State Alcoholic Beverage Control Board; Emory G. Dent and C. M. C. Porter, Members of the Ky. Tax Commission and Members of the Ky. State Alcoholic Beverage Control Board; Hubert Meredith, Attorney General of the Commonwealth of Kentucky; William E. Baxter, Acting Distilled Spirits Administrator of the Ky. State Alcoholic Control Board and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, at Frankfort, Franklin County, Kentucky. On July 22, 1938 I executed same on Albert B. Chandler, Governor of the Commonwealth of Kentucky, by serving a true copy on his private secretary, Walter Mulbry, at his



office in Frankfort, Franklin County, Kentucky, he accepting said service (3:15 P. M.).

J. M. Moore, U. S. Marshal, by R. A. Gayle, Chief Deputy.

[fol. 44] IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—Filed July 26, 1938

Comes the plaintiff, Ziffirin, Incorporated, by counsel, and moves the Court upon its verified Bill of Complaint as amended herein, and upon the facts shown by affidavits tendered herewith, that plaintiff be granted a preliminary injunction against the defendants named in said Bill of Complaint, and each of them, enjoining and restraining said defendants, and each of them, conformably with the prayer of said bill of Complaint as amended pending the further order of the Court.

Norton L. Goldsmith, Howell Ellis, Selligman, Goldsmith, Everhart & Greenbaum, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT AND TO DISSOLVE ORDER—Filed July 26, 1938.

Come the defendants by counsel and move the court to dismiss bill of complaint filed in the above entitled action, and to dissolve the temporary restraining order issued thereon on July 19, 1938, upon the grounds and for the following reasons, to-wit:

1. That the said bill of complaint is void for want of equity and does not state facts sufficient to constitute a valid cause of action in equity in favor of complainant and against the defendant; that the said bill of complaint does not state any matter of equity entitling the plaintiff to relief prayed for nor the facts stated sufficient to entitle plaintiff to any relief against these defendants.

Wherefore defendants pray the judgment of this court whether they shall further answer, and that they be dismissed with their costs.

Hubert Meredith, Attorney General (Signed) Harry D. France, William Hays, Assistant Attorneys General for Defendant, James W. Martin, et al.



## [fol. 45] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING RESTRAINING ORDER—Entered and Filed  
August 29, 1938

This cause came on for hearing pursuant to agreement of all parties thereto at 1:30 o'clock P. M. on Tuesday, July 26, 1938, in the Court Room of the United States District Court for the Western District of Kentucky, at Louisville, Jefferson County, Kentucky, before a Statutory Three-Judge Court convened for the purpose of determining plaintiff's application for a preliminary injunction, by order heretofore entered herein, by the Honorable Mac Swinford, United States District Judge for the Eastern and Western Districts of Kentucky, by calling to his assistance the Honorable Elwood Hamilton, Judge of the Circuit Court of Appeals for the Sixth Circuit, and the Honorable Robert R. Nevin, United States District Judge for the Southern District of Ohio, pursuant to Section 266 of the Judicial Code, whereupon Mr. Goldsmith, attorney for the plaintiff, introduced to the Court his associate counsel, Mr. Howell Ellis, of the Indianapolis, Indiana, bar, and the plaintiff, Ziffrin, Incorporated, by counsel, tendered and offered to file its written motion that it be granted a preliminary injunction against the defendants conformably with the prayer of plaintiff's Bill of Complaint herein, to which motion defendants, by counsel, objected, and in support of said motion plaintiff tendered and offered to file the affidavit of Sam Ziffrin, dated July 23, 1938, the affidavit of M. F. Chandler dated July 22, 1938, the affidavit of Milton Grabfelder, dated July 25, 1938, the affidavit of Edward Gusky, dated July 25, 1938, the affidavit of Edward W. Schalk, dated July 25, 1938, and the affidavit of Frank H. Luther, dated July 25, 1938, and plaintiff also tendered and offered to file the Transcript of Testimony heard in this cause on July 19, 1938, upon plaintiff's motion for a temporary restraining order, but plaintiff, by counsel, expressly stated that it did not presently offer said Transcript in evidence, whereupon the defendants, by counsel and in writing, tendered and offered to file their written motion to dismiss the said Bill of Complaint and to dissolve the temporary restraining order granted and issued thereon herein on July 19, 1938, to which motions the plaintiff by counsel objected, whereupon the Court having heard the statements and arguments of counsel for the respective parties and having duly considered the mat-



ter, ordered and decreed that the aforesaid motion for a preliminary injunction, the aforesaid affidavits, the aforesaid Transcript of Testimony and the aforesaid motions to dismiss said Bill and to dissolve said temporary restraining order, be, and the same are, and each of them is, hereby ordered filed, and further ordered that the hearing of said cause upon said motion for a preliminary injunction be deferred for the present, and that counsel for the parties address themselves to argument of said motion to dismiss said Bill of Complaint and to dissolve said restraining order, and counsel for the respective parties of record, and Stanley B. Mayer, attorney for certain unidentified motor carriers not parties to this cause, thereupon did make statements and [fol. 47] arguments upon defendants' said motions, and the Court having heard said statements and arguments, and having considered the same, and the Court being of the opinion that it should take further time to determine the issue of the constitutionality or unconstitutionality of certain provisions of the Alcoholic Beverage Control Law, of the State of Kentucky, which Statute is known as Carroll's Kentucky Statutes, Sec. 2554 b-97 et. seq., in application to plaintiff's alleged business, and counsel for the respective parties having agreed that hearing upon said motion for a preliminary injunction and decision by the Court thereon might be deferred until after the Court shall have ruled upon and decided said motions to dismiss said Bill of Complaint and to dissolve said restraining order, and counsel for the respective parties having further agreed that the aforesaid temporary restraining order may be extended and continued in full force and effect until the Court shall have heard, ruled upon and determined the issues presented by said motion for a preliminary injunction, and counsel for defendants having stipulated and agreed to waive notice required by the Judicial Code to be given to the defendants and to the Governor and Attorney General of the Commonwealth of Kentucky of the contemplated future hearing of this cause upon said motion for a preliminary injunction as aforementioned, it was, and is, hereby ordered that this cause be, and the same is, hereby submitted upon said motion to dismiss said Bill of Complaint and to dissolve said restraining order, that counsel for the movant-defendants be, and they are, hereby granted until August 15, 1938, within which to file their brief in support of defendants' said motion, that counsel for plaintiff be, and they hereby are,



granted until September 1, 1938, within which to file their brief in opposition to defendants' said motion; and that counsel for defendants be, and they hereby are, granted five days after September 1, 1938, within which to file reply to plaintiff's brief; that hearing upon said motion for a pre-[fol. 48] liminary injunction be, and the same is, hereby ordered deferred until a day subsequent to the date upon which the Court rules upon said motion to dismiss said Bill of Complaint and to dissolve said restraining order; that the aforesaid restraining order be, and the same is hereby, ordered extended and continued in full force and effect until such time as the Court may have sustained said motions to dismiss said Bill and to dissolve said temporary restraining order or until such time as the Court shall have heard and determined said motion for a preliminary injunction, and that said restraining order shall be so continued in full force and effect upon the bond referred to therein and heretofore executed and until the further order of this Court; and that said hearing upon said motion for a preliminary injunction hereafter may be had without giving or service of notice to or upon the defendants, the Governor and Attorney General of the Commonwealth of Kentucky, or any of the—

This order signed and granted this 29 day of August, 1938.

Elwood Hamilton, Judge of the Circuit Court of Appeals for the Sixth Circuit. Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio Sitting by designation. Mac Swinford, Judge of the United States District Court for the Eastern & Western District of Kentucky. Have seen: Norton L. Goldsmith, Howell Ellis, Selligman, Goldsmith, Everhart & Greenebaum, Attorneys for Plaintiff. Have seen: Hubert Meredith, Harry D. France, William Hayes, Attorneys for Defendants.

[fol. 49] IN UNITED STATES DISTRICT COURT

SECOND AMENDED BILL OF COMPLAINT—Filed September 26, 1938

The plaintiff, Ziffrin, Incorporated, before answer filed and by leave of Court, amends its Bill of Complaint as



heretofore amended, and for Second Amended Bill of Complaint herein, and for statement of cause of action against the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, states as follows:

1. On or about March 8, 1938, the defendant, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, the defendant, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, the defendant, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, by virtue of the authority of their said offices, nominated, constituted and appointed the defendant, William E. Baxter, Field Representative of said Kentucky Tax Commission and of said Kentucky State Alcoholic Beverage Control Board, and said William E. Baxter thereupon accepted said appointment, duly qualified as such Field Representative and ever since has been and now is the duly appointed, constituted and acting Field Representative of said Kentucky Tax Commission and of said Kentucky State Alcoholic Beverage Control Board.
2. At all times subsequent to January 1, 1935, the plaintiff has had, and now has, contracts with numerous persons and customers who are residents of and domiciled in Indianapolis, Indiana, Chicago, Illinois, and elsewhere in the States of Indiana and Illinois, and in other States, points and places situated North of the Ohio River, and which customers then had and maintained, and now have



and maintain, their principal offices and places of business and their business domiciles in the aforementioned [fol. 51] cities in the States of Indiana, Illinois and in other States and places lying North of the Ohio River as aforementioned, by which several contracts and for certain agreed hire and compensation to be paid plaintiff in said contracts mentioned and provided, the aforementioned customer-parties to said respective contracts agreed that plaintiff should carry and transport by motor vehicles shipments and consignments of whiskies, alcoholic liquors and distilled spirits purchased by said customers from whiskey distillers and from other persons engaged in the sale of such commodities, residing, domiciled and having their places of business in Louisville, Jefferson County, Kentucky, and within a radius of ten miles of the corporate limits of the said City of Louisville, by which contracts plaintiff was to receive from said distillers and vendors, shipments, consignments and cargoes of commodities of the kind aforesaid, to be delivered by said distillers and vendors to plaintiff at places in Louisville, Jefferson County, Kentucky, and within the ten mile radius aforementioned, consigned by said distillers and other vendors for delivery to plaintiff's said consignee-customers (the aforementioned purchasers of said whiskies, liquors and distilled spirits) at their respective residences, domiciles and places of business situated as aforesaid in said States of Indiana and Illinois, and in other States and places lying North of the Ohio River.

3. At all times subsequent to January 1, 1935, the aforementioned contracts between plaintiff and said consignee-customers have been and now are in full force and effect, and pursuant thereto and in conformity with the terms and provisions thereof, the plaintiff, for compensation and hire, has transported and carried from said City of Louisville and from within the area embraced in the aforesaid ten mile radius, to the City of Indianapolis, Indiana, to the City [fol. 52] of Chicago, Illinois, and to other points and places situated in the State of Indiana, in the State of Illinois and in other States lying North of the Ohio River as aforementioned, numerous large quantities, lots and cargoes of whiskies, alcoholic liquors and distilled spirits by motor vehicle, which aforesaid commodities were sold and consigned by the aforementioned whiskey distillers and



other vendors of said commodities to plaintiff's said consignee-customers, and which were so sold for delivery at said consignee-customers' respective places of residence, domicile and business location in the States of Indiana, Illinois, and other States lying North of the Ohio River, as aforementioned.

4. The said shipments and consignments were delivered by said whiskey distillers and other vendors of the aforesaid commodities to plaintiff at said City of Louisville, Kentucky, and in the area embraced in the ten mile radius aforesaid, consigned for direct and continuous transportation to the aforementioned points and places in the State of Indiana, in the State of Illinois and in other States lying North of the Ohio River, which last mentioned places were the designated destinations of said shipments and consignments, and plaintiff's said consignee-customers directed the plaintiff to carry and transport said consignments and shipments by continuous and uninterrupted carriage and transportation to the aforesaid designated destinations of said respective shipments and consignments, and plaintiff in conducting its business described in the original Bill of Complaint herein and in this present amendment thereto, and in performing its aforesaid contracts with said consignee-customers, did carry and transport said consignments and shipments by continuous and uninterrupted carriage and transportation by motor vehicles from said City of Louisville, and from the area embraced in the aforesaid ten mile radius, to its said consignee-customers' [fol. 53] respective places of residence, domicile and business location situated in the States of Indiana and Illinois, and in other States lying North of the Ohio River, as aforementioned.

5. At all of the times herein mentioned, the direct, convenient, usual and only commercially practical and feasible motor route from said City of Louisville and from said area embraced in said ten mile radius, to Indianapolis, Indiana, was and is over the certain route known as U. S. Highway No. 31, mentioned in the original Bill of Complaint herein. At all of the times herein mentioned, the direct, convenient, usual and only commercially practical and feasible motor vehicle route from said City of Louisville, Kentucky, to said City of Chicago, Illinois, was and is via Indianapolis as aforesaid, and thence over the cer-



tain routes and highways known as U. S. Highway No. 41 and U. S. Highway No. 52. At all of the times herein mentioned said three highways were, ever since have been and now are Federal Aid Highways established and maintained under the laws of the Congress of the United States and with the aid and assistance of funds and monies supplied and furnished by the Government of the United States. The plaintiff's transport and carriage operations mentioned in the original Bill of Complaint herein and in this present amendment thereto, necessarily have been and now are conducted over and along the aforesaid three Federal Aid Highways.

6. On July 1, 1935, and prior thereto, plaintiff was, ever since has been, and now is, in bona fide operation as a contract carrier of freight by motor vehicle for hire over and along the routes aforesaid, and each of them, and from and between the cities, points and places aforementioned, and elsewhere. On or about February 4, 1936, plaintiff duly and properly made, lodged and filed proper application [fol. 54] in writing to and with the Interstate Commerce Commission for a permit to be issued by said Interstate Commerce Commission authorizing plaintiff to engage in the business of a contract carrier of freight by motor vehicle for hire in interstate commerce on any public highway within the territory and over and along the routes aforementioned which were specified and identified in said application. At all times subsequent to the aforementioned filing thereof the aforesaid application has been, and now is, pending before and undetermined by said Interstate Commerce Commission.

7. At all of the times herein mentioned and under the laws of the Commonwealth of Kentucky, said City of Louisville was, and is, a City of the first class.

8. At all of the times herein mentioned the distillery plant of Joseph E. Seagram & Sons, Inc., mentioned in the original Bill of Complaint herein was, and now is, situated at a point lying less than ten miles from the corporate limits of said City of Louisville, and was and is situated at a place within the area embraced in the aforesaid ten mile radius.

9. Plaintiff withdraws, deletes and expunges from its Original Bill of Complaint herein as heretofore amended,



the words and figures following, and each of them, which were included in said Original Bill by mistake of the draftsman thereof, to-wit:

"and in the further business of accepting delivery of such goods, wares and merchandise at points situated in places and states other than Kentucky, for carriage and delivery by motor vehicle pursuant to special contracts, to persons residing and situated and doing business in said City of Louisville, and in delivering the same consistently with said undertakings of transport and carriage."

[fol. 55] 10. At all of the times herein and in the Bill of Complaint as heretofore amended herein mentioned and referred to, the business and operations of carriage and transportation of commodities of the kind and character aforesaid, conducted by plaintiff in the State of Kentucky, and described in the Bill of Complaint herein, as heretofore and as hereby amended, have consisted solely and exclusively in the carriage and transportation by motor vehicle, pursuant to special contracts, of goods, wares and merchandise of the kind and character aforesaid, delivered to the plaintiff for carriage and transport, and by the plaintiff carried and transported, in continuous and uninterrupted transit and carriage from the said City of Louisville and from the aforementioned area embraced in the aforesaid ten mile radius, to the aforementioned Cities and other points and places situated in the States of Indiana and Illinois, and in other States lying North of the Ohio River, for delivery to persons residing, domiciled and having their places of business in said States of Indiana, Illinois and other States lying North of the Ohio River. At all of the times aforesaid, plaintiff's aforesaid business of carriage of commodities of the kind and character aforesaid, has consisted and now consists solely and exclusively in the carriage and transportation of said commodities from the aforementioned points and places in Jefferson County, Kentucky, in exportation thereof from the State of Kentucky, in interstate commerce to points and places in the States of Indiana and Illinois, and in other States lying North of the Ohio River as aforementioned. In the period of one year next preceding July 1, 1938, and in the conduct of its aforementioned business of carrying and transporting the aforesaid interstate exports of said commodities the plaintiff realized net operating gains and profits in



an amount exceeding \$7500.00. Said business has been and is a growing and expanding business, and has present [fol. 56] prospects of substantial increase in extent, volume and net operating profits.

11. Plaintiff hereby makes defendant, William E. Baxter, a party hereto in his aforementioned official capacity.

12. Plaintiff incorporates by reference, reiterates and reaffirms each and all of the statements and allegations contained in its Bill of Complaint as amended herein except insofar as the same may be inconsistent with the statements and allegations herein contained.

Wherefore, the plaintiff, Ziffrin, Incorporated, prays that a subpoena and process issue herein against the defendant, William E. Baxter, Field Representative of the Department of Revenue of the Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board; prays further that temporary restraining order and that preliminary and permanent injunctions be adjudged, decreed, granted, entered and issued herein enjoining and restraining the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, their successors, assistants, deputies and agents, from bringing, and from threatening to bring, either directly or indirectly, and from permitting [fol. 57] to be brought, either directly or indirectly, any civil, criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing, or attempting or threatening to enforce, the pretended Alcoholic Beverage Control Law identified in the Original Bill of Complaint herein, or any provision thereof, against the



plaintiff, its officers, representatives, agents or employees, or any of them, and from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic beverages whatsoever, carried and transported by plaintiff as a contract motor carrier for hire from any point or place in Jefferson County, Kentucky, consigned and destined for delivery to any point or place in the State of Indiana or in the State of Illinois, or in any State or place lying North of the Ohio River, and from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them, and from causing, or attempting, or threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested for violating any provision of said pretended Alcoholic Beverage Control Law, and from taking, and from attempting or threatening to take, any other action in any manner to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives, and automotive equipment, or any of them, in conducting the aforesaid operations of transport and carriage, or any of them; prays further that the defendants, their successors, assistants, agents and deputies, and each of them, be ordered restrained and enjoined as aforesaid by preliminary injunction issued herein during the pendency of this cause; prays further that an order to show cause issue herein upon application of the plaintiff directed to [fol. 58] defendants requiring them to show cause why a preliminary injunction should not issue as aforesaid; prays further that a temporary restraining order issue herein pending the hearing of said order to show cause why a preliminary injunction should not be issued and granted herein; prays further that upon the hearings aforesaid, the said pretended Alcoholic Beverage Control Law be adjudged, decreed, declared and held to be unconstitutional, illegal, null and void, in application to the plaintiff, its officers, agents, employees, cargoes and automotive equipment engaged and transported in the course and conduct of plaintiff's aforesaid business operations; prays further that a perpetual and permanent injunction be granted and issued restraining the enforcement of said pretended Alcoholic Beverage Control Law as hereinabove prayed for; prays further for its costs herein incurred and expended, and for



all further, general and equitable relief to which plaintiff may appear to be entitled.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky; Howell Ellis, 520 Illinois Building, Indianapolis, Indiana; Selligman, Goldsmith, Everhart & Greenebaum, 615 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Plaintiff.

*Duly sworn to by Sam Ziffrin. Jurat omitted in printing.*

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER FILING SECOND AMENDED BILL OF COMPLAINT—Entered and Filed September 26, 1938

This day came the plaintiff by counsel and tendered his second Amended Bill of Complaint herein, and same is now ordered filed.

Mac Swinford, Judge.

IN UNITED STATES DISTRICT COURT

RECEIPT—Filed October 6, 1938

Come the defendants, by counsel, and hereby acknowledge that they have received from plaintiff's counsel this 21st day of September, 1938, three (3) copies of the Second Amended Complaint of the plaintiff, verified by Sam Ziffrin on September 19, 1938.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

CONSENT TO FILING OF SECOND AMENDED COMPLAINT—Filed October 6, 1938

Come the defendants in the above entitled action, by counsel, and hereby consent that the Second Amended Bill of Complaint of the plaintiff, Ziffrin, Incorporated filed in the



[fol. 60] office of the Clerk of this Court on the 26th day of September, 1938, may be filed with the papers in this action and may be made part of the record in this action.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William<sup>3</sup> Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendants.

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IN UNITED STATES DISTRICT COURT

ENTRY OF APPEARANCE OF DEFENDANT WILLIAM E. BAXTER—  
Filed October 6, 1938

Comes defendant, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky, and Field Representative of Kentucky State Alcoholic Beverage Control Board, by counsel, and without presently admitting that he is such Field Representative and without waiving any right or privilege he may have to file motions and answer herein, hereby enters his appearance to the complaint as amended, filed herein by the plaintiff, Ziffrin, Incorporated.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendant, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky, and Field Representative of Kentucky State Alcoholic Beverage Control Board.

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[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER FILING RECEIPT—Entered and Filed October 6, 1938

Comes this day the defendants and file Receipt of Second Amended Petition, Consent signed by defendants' counsel that said Second Amended Petition may be filed and Entry of Appearance of William E. Baxter, in official capacities, and same are noted of record.

Mac Swinford, Judge.



## IN UNITED STATES DISTRICT COURT.

JOINT MOTION TO EXTEND MOTION TO DISMISS—Filed October 10, 1938

Come the plaintiff and the defendants, by their respective counsel, and jointly move the Court to enter an order herein ordering that defendants' motion to dismiss Complaint and to dissolve the Temporary Restraining Order issued herein thereon, which motion was filed herein on July 26, 1938, be regarded as amended and extended so as to extend to plaintiff's Complaint as Amended herein, including Second Amended Complaint filed September 26, 1938.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendants. Norton L. Goldsmith, Howell Ellis, Selligman, Goldsmith, Everhart & Greenbaum, Attorneys for Plaintiff.

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 IN UNITED STATES DISTRICT COURT

ORDER FILING JOINT MOTION—Entered and Filed October 10, 1938

Come the plaintiff and the defendants, by their respective counsel and file joint motion moving that the pending motion to dismiss Complaint and Dissolve Temporary Restraining Order be extended to the Complaint as Amended, including Second Amended Complaint filed September 26, 1938, and same is noted of record.

Mac Swinford, Judge.

[fol. 62] IN UNITED STATES DISTRICT COURT

OPINION—Filed October 15, 1938

Before Hamilton, Circuit Judge, and Nevin and Swinford, District Judges.

SWINFORD, District Judge:

The plaintiff, Ziffrin, Incorporated, filed its bill of complaint against the officers charged with the responsibility



of enforcing the liquor control laws of the State of Kentucky, and seeks to enjoin the enforcement of the provisions of the Alcoholic Beverage Control Law of Kentucky.

The defendant filed a motion to dismiss the plaintiff's bill.

The question for determination is the constitutionality under the federal constitution of the Alcoholic Beverage Control Law of Kentucky, enacted at the 1938 session of the General Assembly.

It is alleged that since March 20, 1933, and at all of the times involved, the plaintiff, Ziffrin, Incorporated, has been and is an Indiana corporation, domiciled at Indianapolis, Indiana, authorized by its charter to engage, and actually engaged, in the business of an interstate contract carrier of freight by motor vehicle for hire.

[fol. 63] On July 1, 1935, and prior thereto, plaintiff was in bona fide operation as a contract carrier by motor vehicle between Louisville, Kentucky, and Chicago, Illinois, and elsewhere, conducting operations in interstate commerce along and over Federal Aid Highway, U. S. No. 31, from Louisville northwardly. On September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which interstate contract carriers might file applications for permits. Prior to February 12, 1936, plaintiff filed application with the Interstate Commerce Commission for a permit as an interstate contract carrier of freight for the aforementioned territory and route, which application has continued, and now continues, pending and undetermined before the Interstate Commerce Commission, with the consequence under Federal Motor Carrier Act, 1935 (U.S.C.A., Title 49, Sec. 309), that the continuance of plaintiff's operations has been and is lawful.

In October and November, 1936, plaintiff entered into contracts with Schenley Products Company and Joseph E. Seagram & Sons, Inc., and their affiliates, all engaged in the business of whiskey distillers, to transport for hire by motor vehicles consignments of whiskies to be delivered by said bailors to the plaintiff in Louisville, Kentucky, consigned by bailors for delivery to the consignee-purchasers of said whiskies at such consignees' places or residence or business location in Chicago, Illinois, and in points other than the State of Kentucky. These contracts have continued to be and are in full force and effect; the plaintiff has carried



large quantities of whiskies pursuant thereto and conformably therewith and plaintiff has done like and similar business with and for other customers.

The direct, convenient and usual motor vehicle route from Louisville to Chicago is via Indianapolis over U. S. Highway No. 31, and that route has been used and employed by plaintiff in its operations.

[fol. 64] The transportation of this whiskey has been the principal part of plaintiff's business and that business has been and is an established and profitable one.

The business has been interstate commerce exclusively.

During the year preceding July 1, 1938, plaintiff owned and operated seven trucks, operated a total of twenty-five trucks, employed forty men, and had in the business a capital investment in excess of \$10,000.00.

On March 7, 1938, the Governor of Kentucky approved the Alcoholic Beverage Control Law known as Carroll's Kentucky Statutes, Sec. 2554b-97, et seq.

Plaintiff previously had complied with all requirements of Kentucky laws governing licenses, certificates and process agent.

Insofar as its license provisions are concerned, this law became effective July 1, 1938, and it thereupon became incumbent upon plaintiff, if it were to continue its aforementioned business conformably with the terms of the law, to have a Transporter's License. 1938 Supplement to Carroll's Kentucky Statutes Sec. 2554b-190.

Section "18" of the Act, referred to in this Statute is subsection 7 of Section 2554b-114, Carroll's Kentucky Statutes.

In order to be eligible to obtain the Transporter's License from the Department of Revenue, it was necessary for plaintiff to have a common carrier's certificate from the Division of Motor Transportation. 1938 Supplement to Carroll's Kentucky Statutes, Sec. 2554b-154 (7).

On May 25, 1938, plaintiff applied for a Liquor Transporter's License, paid the required fee, and with surety executed the bond required therefor, and on June 7, 1938, plaintiff applied to Division of Motor Transportation for [fol. 65] a common carrier's certificate to operate a motor freight line from Louisville, Kentucky, to the Indiana State line over U. S. Highway No. 31, and in interstate commerce only.

On or about June 30, 1938, plaintiff's application for a common carrier's certificate was denied; plaintiff thereby



was rendered ineligible to obtain or to receive a Transporter's License and on July 8, 1938, the Commissioner of Revenue and the Alcoholic Beverage Control Board denied the application for a Transporter's License on the ground that it did not hold a common carrier's certificate.

The Bill charges the law to be unconstitutional insofar as it assumes to bar plaintiff from engaging in interstate commerce as a contract carrier. The Bill, as amended, charges the law to contravene the Commerce Clause, the Due Process and Equal Protection Clauses.

Counsel for the plaintiff contend that this statutory three judge court has no jurisdiction to entertain the motion to dismiss. An examination of the cases cited to support this plaintiff's claim reveals that two of them were decisions rendered before Section 266 of the Judicial Code (Title 28 U.S.C.A. Sec. 280) was amended in 1925. This Amendment added the last sentence to Section 266 of the Judicial Code (28 U. S. C. A. § 380), which is as follows: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The amendment expressly states that the three judge court must sit in final hearing and hence grant a final decree.

[fol. 66] The Supreme Court, in the case of *Stratton, etc. v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 14, said: "By the amendment of February 13, 1925 (43 Stat. 938), the provision with respect to the presence of three judges was made to apply to the final hearing in such suit in the District Court, and from the final decree, granting or denying a permanent injunction, a direct appeal lies to this court." \* \* \* "These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by these judges on the application for an interlocutory judgment."

Under the Act, as amended, the three judge court has the same power as a single district judge. It is in fact a district court composed of three judges instead of one. One of the questions for determination is the sufficiency of the pleadings to state a cause of action. The only way in which



this can be determined is to decide whether or not the Kentucky Statute is constitutional.

We are of the opinion that this three judge court has authority to rule upon this motion to dismiss.

If this Act of the Kentucky Legislature does not violate the guarantees under the federal constitution to those engaged in interstate commerce it is valid only because it is a reasonable exercise of the police power of the sovereign State of Kentucky.

[fol. 67] The legislature determines what regulations are proper and necessary in the exercise of the police power and it is not for the courts to pass upon the wisdom, policy or expediency of the laws passed in exercising this sovereign power. *Halter v. Nebraska*, 205 U. S. 34. In this case Mr. Justice Holmes in the opinion laid down the basic rule of construction in the following language: "In our consideration of the questions presented we must not overlook certain principles or constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

It then becomes the duty of the courts to determine what are proper subjects for the exercise of this power, what constitutional restrictions and limitations must be applied and whether the statute in question is a reasonable exercise of the power. In this connection the courts may apply certain tests to the legislation and may judicially determine whether the law has a real and substantial relation to the public welfare, safety and health and actually tends in some real degree to promote these objects. *Mugler v. Kansas*, 123 U. S. 623.

The basis of the police power lies in the constitution which regards the public welfare, safety and health of the citizens of that state. However, a close examination of the authority [fol. 68] ties will show that whenever there is a conflict be-



tween the police power and the constitution the courts will construe the constitution to fit in with the police regulations if at all reasonable.

In the case of *Townsend v. Yeomans*, 301 U. S. 441, the court said: "The case calls for the application of the well established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. *Savage v. Jones*, 225 U. S. 501, 523; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U. S. 493, 510; *Carey v. South Dakota*, 250 U. S. 118, 122; *Lehigh Valley R. Co. v. Public Utilities Comm'n*, 278 U. S. 24, 35; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm'rs*, 283 U. S. 380, 392, 393; *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 158."

The expressly granted power of the federal government to regulate interstate commerce and the power of the individual states to enact regulations for their internal police are coordinate powers which each must respect. The states jealously guard the prerogative duty of protecting the public safety, health and morals. Courts have consistently recognized this right. Necessarily the progress of time has broadened rather than limited the construction placed upon the commerce clause of the Constitution. The fundamental law vitalized by the vigorous opinion of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton 1, has been consistently adhered to and extended. In the light of intervening events any other interpretation would appear almost absurd. If progress is to continue future generations looking back upon this period must find the courts equally as farsighted and practical.

[fol. 69]. The Courts with equal consistency have respected the right of the states as the proper governmental agency, to enact and enforce reasonable police regulations. Under our dual system of government both are equally necessary and must be preserved entire, but neither can be so exercised as to materially affect or encroach upon the other. State laws, not primarily aimed at commerce, but intended as legitimate exertions of the authority of the state to provide for the public safety, health and morals of the citizens of that state are not invalid because they may re-



motely or incidently impose restrictions on interstate commerce. *Sherlock v. Alling*, 93 U. S. 99.

The question whether the power of Congress to regulate interstate commerce is exclusive or whether the states have a concurrent authority to any extent, over the same subject is the most difficult which has arisen in the construction of this clause of the Constitution. An examination of the authorities might reveal a division into four classes of guiding rules.

First the states cannot lawfully enact measures tending directly to regulate, obstruct or interfere with such commerce as is confided to the paramount control of Congress or which may be inconsistent with the legislations of Congress on the same subject. I think it is within this first class that the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. Ed. 1511, cited by counsel for plaintiff Fall. See opinion giving many illustrations.

Second, if the particular subject to which the power is to be directed is national in its character or is such that it can properly be regulated only by a uniform system, to such an extent that varying regulations by the individual states would cause inconvenience and be a detriment, it is not competent for the states to legislate on the subject, and if Congress does not act, its silence is to be taken as an evidence of its will that the subject shall be free from all regulation and restriction.

[fol. 70] The rule is laid down in the case of *Sligh v. Kirkwood*, etc., 237 U. S. 52, 58. "That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases*, 230 U. S. 352."

The same rule of law is emphasized in the more recent case of *Townsend v. Yeomans*, *supra*, in which it was said: "We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for



we are of the opinion that, if it be assumed that Congress has that authority, it has not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people."

Third, state legislatures may regulate matters local and limited and which are most likely to be wisely provided for by such diverse rules as the authorities of the different states may deem applicable to their localities and on which Congress has not expressly legislated. *Cooley v. Board of Wardens*, etc., 12 How. 299; *United States v. Adair*, 152 Fed. 727.

Fourth, there are certain classes of state legislation which, although they may incidentally or remotely affect interstate commerce, are not intended as regulations thereof, but have their primary concern for the public health, safety, and welfare of the citizens of the particular state and which are [fol. 71] properly in the nature of police regulations. If these laws are reasonable and bona fide and there is no Act of Congress expressly covering the same ground, they are valid. And it is understood that in so far as they relate to, or affect commerce Congress, by refraining from acting on the same subject, sanctions and adopts them. It is within this fourth class, if any, that the case at bar falls.

By the Webb-Kenyon Act, 27 U. S. C. A. 122, passed in 1913, Congress recognized a condition which only national legislation could meet. To prevent the importation of liquor from a "wet" state into a "dry" state an adequate and complete law was enacted.

Prior to this in 1890, Congress had enacted the Wilson Act, 27 U. S. C. A. 121.


From these enactments and the construction placed upon them by the courts it is seen that Congress has carefully considered the interstate shipment of liquor and has expressly avoided enacting legislation dealing with the shipping of liquor out of a state as is the case at bar.

Counsel for the defendants insist that this case is covered by the wording of the Webb-Kenyon Act.

This Act provides: "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but



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subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person [fol. 72] interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The defendants insist that this language expressly gives the states a right to enact legislation pertaining to the exportation of liquor and cite as their authority the case of *Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 Atl. 590, 110 A. L. R. 919.

In this case the Pennsylvania court construed the Webb-Kenyon Act as giving this right to the states in express terms. In the opinion it said: "While the Webb-Kenyon Act was primarily aimed at the importation of intoxicating liquors into a state, in violation of the laws of that state, it also includes in express terms the interstate transportation of all liquor 'in any manner used \* \* \* in violation of any law of such State.'" 27 U. S. C. A. §122. We have no doubt of the state's power to condemn and forfeit both the liquors so unlawfully transported and the vehicle used in such unlawful transportation."

With this construction of the Webb-Kenyon Act we cannot agree. This Act was passed in our judgment to deal wholly with importation.

It is interesting to note the history of this class of federal legislation. In 1887 the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company*, 125 U. S. 465, laid down the rule that a statute of a state, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, under a license from a county court of the State, is, as applied to a sale by the importer, and in the original pack- [fol. 73] age or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states.



This was followed in 1889 in the case of *Leisy v. Hardin*, 135 U. S. 100.

In 1890, apparently as an outgrowth of these two decisions, Congress enacted the Wilson Act, 27 U. S. C. A. 121, which provides as follows: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Following this was the Webb-Kenyon Act in 1913. This Act was held not to have been repealed by the National Prohibition Act nor the Eighteenth Amendment under which it was enacted, in *McCormick & Co., v. Brown*, 286 U. S. 131; 52 Sup. Ct. 522; 76 L. Ed. 1017; 87 A. L. R. 448.

The Twenty-first Amendment provides in Section 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In the light of the authorities cited, it can well be reasoned that where Congress has legislated upon importation, had this important subject before committees and under debate [fol. 74] and deliberately failed to enact legislation dealing with exportations in interstate commerce it has thereby deliberately invited each state to make its own laws governing this particular field evidently acutely conscious of the fact that each state was better qualified to give its own citizens the character of laws which applied to the local problems.

This is a most practical matter and must be dealt with in a practical way.

Modern means of transportation are so efficient that state police powers should be broadened rather than more narrowly confined. What is a reasonable regulation today may have been an unreasonable regulation in the days of dirt roads and horse drawn vehicles.

With broad, well paved highways and high powered motor vehicles, with airplanes and open airways, by both means



of which large quantities of intoxicating liquors can be transported across state lines in a short space of time, it becomes a practical impossibility to accurately check the output of plants engaged in its manufacture. It cannot therefore be said to be unreasonable to require its transportation to the state line by regularly engaged transportation services, with fixed termini and maintaining definite schedules for handling shipments of goods. While it may be suggested and has been inferred by plaintiff's counsel that this law was enacted to give some particular class engaged in the transportation business an advantage over those of the same class as his client, this cannot be said to reflect upon the reasonableness of the regulation itself. We must presume that the legislature sought to enact a measure which it believed to be for the good of the state and its citizens, and are here called upon to pass upon the constitutionality of the legislation, not upon the motives of the majority of the members of the legislature and the Governor who signed the bill.

The cases cited by counsel for the plaintiff and relied upon by them treat principally with the general rules of inter-[fol. 75] state commerce. We think it is well for us to confine ourselves to the cases dealing with the particular product involved herein. That of alcoholic beverages. The celebrated case of *Mugler v. Kansas*, 123 U. S. 623, emphasizes this fact. The Supreme Court in its opinion reviewed many authorities and had this to say: "In the License Cases, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: 'If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitu-



tion of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

Here is a product which is generally recognized by its nature to be peculiarly subject to regulation under the police power. It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce and must be regulated by some authority. There is no federal regulation. There is no Act of Congress prescribing the method or agency through which it may be transported over the highways or rights-of-ways within the borders of the state. The lack of national legislative control is conspicuous.

[fol. 76] We think the language of the Supreme Court in the case of *Sherlock v. Alling, etc.*, 93 U. S. 99, might be applied to the case at bar. "In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon examination of the cases in which they were rendered it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or executed a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

Further on in the opinion the Court said: "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its



territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit."

[fol. 77] "That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never been doubted. On all grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the decision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such prohibition to particular parts of the state at their option, laws licensing the traffic in liquors, regulating or prohibiting the sale on certain days or in certain places or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales." Black's Constitutional Law, Third Series, pg. 402.

Since intoxicating liquor is universally recognized as a legitimate subject over which the states may exercise the police power, even to the extent of denying the right to manufacture, it cannot be consistently held that they may permit it to be manufactured, but then lose complete control of what is done with it.

If the state can arbitrarily grant or withhold the right to manufacture liquor on the theory that the nature of the product was something that authorized strong regulation, then that regulation should certainly continue so long as the admittedly dangerous element is within the borders of the state. It does not lose its dangerous element by being [fol. 78] merely labeled for exportation to a foreign state or country, even though it might incidentally interfere with interstate commerce.

It is an absurdity to say that Kentucky can control its liquor output but cannot control its distribution. The reason for one applies with triple force to the other. There are hundreds of independent trucks operating in Kentucky under a contract carrier's license. They have no schedule,



no fixed route, and no definite termini. It would be an impossibility to determine the quantity or distinction, whether within or without the State of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor. Assuming that liquor, uncontrolled, is a dangerous element to the health, morals and welfare of the citizens of Kentucky, there appears no greater means by which Kentucky could mistreat *here* citizens than to permit the manufacture and sale of liquor but have nothing to say about its handling while within the borders of the state.

The Pennsylvania Supreme Court, in the case of *Commonwealth v. One Dodge Motor Truck*, *supra*, in this connection said: "The foregoing decisions leave no doubt that the Commonwealth of Pennsylvania has the power to prohibit the manufacture of alcoholic liquors within its borders. And this is so, even though such liquors are intended for shipment only out of the state. *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. The power to prohibit absolutely includes the power to prohibit conditionally, or to impose reasonable regulations or conditions on such manufacture. *Eberle v. Michigan*, 232 U. S. 700, 34 S. Ct. 464, 58 L. Ed. 803; *Com. v. Vigliotti*, 271 Pa. 10, 115 A. 20, affirmed *Vigliotti v. Pennsylvania*, 258 U. S. 403, 42 S. Ct. 330, 66 L. Ed. 686; *Com. v. Stofchek*, *supra*. "The greater power includes the less." *Seaboard Air Line Ry. v. North Carolina*, *supra*. It is common knowledge that the successful administration of statutes prohibiting or regulating the traffic in intoxicat-[fol. 79] ing liquors depends on the ability of the state to enforce them; and the state's success in enforcing such laws is in direct proportion to its ability to control the transportation and delivery of the liquors. The state will have comparatively little trouble in enforcing its statutes prohibiting the manufacture, sale, and possession of illegal or bootleg liquors, if it can control their transportation and delivery; and the transportation and delivery by automobiles, motor-trucks, and motor vehicles constitute the greatest difficulty. This was recognized by the Supreme Court of the United States in *United States v. Simpson*, *supra*, where the opinion writer, Mr. Justice Van Devanter, said, speaking of the "Reed Amendment", *supra*: "Had Congress intended to confine it to transportation by railroads and other common carriers it may well be assumed that other words appropriate to the expression of that intention



would have been used: And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, autotrucks and other private vehicles that it would not be of much practical benefit." 252 U. S. 465, at page 467, 40 S. Ct. 464, 64 L. Ed. 665, 10 A. L. R. 510."

We are of the opinion that this is a valid and reasonable regulation under the police power and does not contravene the Commerce, Due Process or Equal Protection Clauses of the Federal Constitution.

The action should be dismissed.

(Signed.) Mac Swinford, Judge, Eastern and Western Districts of Kentucky.

[fol. 80] IN UNITED STATES DISTRICT COURT

THIRD AMENDED COMPLAINT—Filed November 22, 1938.

The plaintiff, Ziffrin, Incorporated, before answer filed and by leave of Court, amends its Complaint as amended herein, and for third amendment thereto; and for further statement of its cause of action against the defendants herein, states as follows:

(1) The determination and decision of D. C. Moore, Director of the Division of Motor Transportation of the Commonwealth of Kentucky, that plaintiff was not eligible to receive a Common Carrier's Truck Certificate, a certificate of public convenience and necessity, which decision and determination were rendered by him on or about June 30, 1938, pursuant to a hearing had June 23, 1938, upon plaintiff's application for issuance to it of said Certificate, all as in the original complaint herein mentioned and referred to, were based and rested upon the ground, expressed and assigned by said Commissioner in writing, that plaintiff had been, and was, engaged in conducting the business of [fol. 81] a contract carrier of freight by motor vehicle for hire, and that plaintiff had not been, and was not, engaged in the business of a common carrier of freight by motor vehicle for hire.

(2) The consignments and cargoes of whiskies, alcoholic liquors and distilled spirits delivered to plaintiff in Jefferson County, Kentucky, by the consignors thereof for trans-



portation and carriage therefrom to places situated North of the Ohio River, all as alleged in said complaint as amended; have been, are, and will be, delivered to plaintiff with the intent, purpose and directions of said consignors, communicated to the plaintiff, that said consignments and cargoes, and each of them, should be, and shall be, immediately transported, carried and delivered by plaintiff to the respective consignees of said consignments and cargoes as alleged in said complaint as amended.

(3) The civil, criminal, penal and confiscatory actions and proceedings, institution and prosecution of which against plaintiff, its officers, agents, employees, automotive equipment, and cargoes, all in the complaint as amended herein mentioned and referred to and therein alleged to be intended and threatened by defendants, in number are, and will be, in excess of ten, and are, and will be and will prove, vexatious, unwarranted and unjustified, unless defendants are enjoined as sought herein.

(4) Plaintiff reiterates and reaffirms each and all of the statements and allegations contained in its Complaint as heretofore amended herein, except insofar as the same may be inconsistent with the statements and allegations herein contained.

[fol. 82] Wherefore, the plaintiff, Ziffirin, Incorporated, prays judgment and equitable relief against the defendants, and each of them, as in its complaint as amended herein.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky. Howell Ellis, 520 Illinois Building, Indianapolis, Indiana. Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky.

#### IN UNITED STATES DISTRICT COURT

DEFENDANTS' ACKNOWLEDGEMENT OF RECEIPT OF COPIES OF  
PLAINTIFF'S THIRD AMENDED COMPLAINT AND CONSENT  
THAT SAID AMENDMENT MAY BE FILED—Filed November  
22, 1938

☞ Come defendants in the above entitled action, by counsel, and hereby acknowledge receipt from plaintiff of three (3)



copies of the Third Amended Complaint of the plaintiff, Ziffrin, Incorporated, and hereby consent that the said Third Amended Complaint may be filed and made part of the record herein.

Hubert Meredith, Attorney General; Harry D. France, Assistant Attorney General; William Hayes, Assistant Attorney General; H. Appleton Federa, of counsel, Frankfort, Ky., Attorneys for Defendant.

[fol. 83] IN UNITED STATES DISTRICT COURT

JOINT MOTION TO EXTEND MOTION TO DISMISS—Filed November 22, 1938

Come the plaintiff and defendants, by their respective counsel, and jointly move the Court to enter an order herein ordering that defendants' motion to dismiss complaint as amended and to dissolve the temporary restraining order issued herein, which motion was filed herein on July 26, 1938, be regarded as amended and extended so as to extend to plaintiff's complaint as amended herein, including the Third Amended Complaint filed herein.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky; Howell Ellis, 520 Illinois Building, Indianapolis, Ind.; Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Plaintiff. Hubert Meredith, Attorney General; Harry D. France, Assistant Attorney General; William Hayes, Assistant Attorney General; H. Appleton Federa, of Counsel, Frankfort, Kentucky, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

WAIVER OF NOTICE—Filed November 22, 1938

Come Honorable Albert B. Chandler, Governor of the Commonwealth of Kentucky, in person, and the defendants in the above entitled action (including in their number Hubert Meredith, Attorney General of the Commonwealth of



Kentucky), by counsel, and hereby waive the notice required by the Judicial Code, Section 266, as amended, of the motions and applications heretofore filed and made in said action by the plaintiff, Ziffrin, Incorporated, on July 26, 1938, respectively, that plaintiff be granted:

(1) A preliminary injunction; and

(2) An injunction pending the appeals to be prosecuted by the plaintiff to the Supreme Court of the United States from the final judgment of the Statutory Three-Judge Court to be entered in said action conformably with the Court's Opinion therein, dated October 15, 1938,

[fol. 84] and similarly waive notice required as aforesaid of the hearing by the Court of said motions and applications, and each of them.

A. B. Chandler, Governor of Commonwealth of Kentucky; Hubert Meredith, Attorney General of Commonwealth of Kentucky; Harry D. France, Assistant Attorney General of Commonwealth of Kentucky; William Hayes, Assistant Attorney General of Commonwealth of Kentucky; H. Appleton Federa, of Counsel, Frankfort, Kentucky, Attorneys for Defendants.

[fol. 85] IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered and Filed November 22, 1938

This cause having come on for hearing before a Statutory Three-Judge Court heretofore duly convened by order heretofore entered herein by the Honorable Mac Swinford, Judge of the United States District Courts for the Eastern and Western Districts of Kentucky, by calling to his assistance the Honorable Elwood Hamilton, Judge of the United States Circuit Court of Appeals for the Sixth Circuit, and the Honorable Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio, pursuant to Section 266 of the Judicial Code, as amended, and the plaintiff having tendered and moved to file (a) its Third Amended Complaint herein, (b) Acknowledgment by Defendants of Receipt of Copies of said Third



Amendment and Consent of Defendants that said Third Amendment May Be Filed, and (c) written Waiver of Notice of Albert B. Chandler, Governor of the Commonwealth of Kentucky, and of the defendants, including the Attorney General of the Commonwealth of Kentucky, waiving notice required by the Judicial Code, Section 266, of the filing; making and hearing of plaintiff's hereinafter mentioned motions and applications for a preliminary injunction and [fol. 86] for an injunction pending appeal, and the parties hereto, by their respective counsel, also having tendered their Joint Motion that defendants' motion, tendered July 26, 1938, to dissolve the temporary restraining order issued and granted herein on July 19, 1938, and to dismiss the complaint as amended herein, be regarded as amended and extended so as to extend to plaintiff's complaint as amended, including said Third Amendment, and the parties hereto, by counsel, also having tendered their second Joint Motion that the liability of the plaintiff, as principal, and of Fidelity & Deposit Company of Maryland, as surety, upon the temporary restraining order bond executed herein on July 19, 1938, be reduced to the penal sum and amount of Two Thousand Dollars (\$2,000.00), and the Court having ascertained that said tendered Third Amended Complaint in no wise changes or alters the grounds upon which plaintiff claims to be entitled to equitable relief herein, and the Court having sufficiently considered the matter and being sufficiently advised, it is now and hereby ordered, adjudged and decreed as follows, to wit:

(1) That the aforesaid Third Amended Complaint, Acknowledgment by Defendants of Receipt of Copies of said Third Amendment and Consent of Defendants that said Third Amendment May Be Filed herein, the aforesaid written Waiver of Notice, and the two aforesaid Joint Motions, be, and the same are, and each of them is, hereby ordered filed and made part of the record herein;

(2) That the aforesaid Joint Motion that defendants' aforesaid motion to dissolve the aforesaid restraining order and to dismiss the complaint herein be extended as aforesaid, be, and the same is, hereby sustained, and it is hereby ordered that the said motion to dissolve said restraining order and to dismiss said complaint be, and the same is, [fol. 87] hereby extended to plaintiff's Complaint as Amended herein, including said Third Amended Complaint;



(3) That the aforesaid Joint Motion to reduce the liability of said principal and surety upon the aforesaid temporary restraining order bond executed July 19, 1938, be, and the same is, hereby sustained, and it is hereby ordered that the liability of the plaintiff, as principal, and of said Fidelity & Deposit Company of Maryland, as surety, upon said bond, be, and the same is, hereby reduced to the penal sum and amount of Two Thousand Dollars (\$2,000.00), said reduction in liability to be effective from and after the date of the entry of this order and judgment;

(4) That so much of the order entered herein on August 29, 1938, as ordered that hearing of this action on the plaintiff's motion, tendered herein on July 26, 1938, that plaintiff be granted a preliminary injunction, be deferred, is hereby vacated, set aside and held for naught, and it is now and hereby ordered that this action be, and the same is, hereby submitted upon plaintiff's said motion that it be granted a preliminary injunction;

(5) That the Opinion of the Court heretobefore filed herein, and dated October 15, 1938, be, and the same is, hereby extended to the complaint as amended herein, said Third Amended Complaint included, and is made a part of the record herein, and it is further and hereby ordered that said Opinion shall, and does, constitute the Court's Conclusions of Law, which solely and exclusively constitute the grounds of the Court's action taken herein with respect to the plaintiff's aforementioned motion that it be granted a preliminary injunction, with respect to defendant's aforementioned motion that the aforesaid temporary restraining [fol. 88] ing order be dissolved and that the aforesaid complaint as amended be dismissed, to which Conclusions of Law, and each of them, plaintiff asks, and is hereby granted, exceptions;

(6) That this action having been heard and duly submitted upon plaintiff's said motion for a preliminary injunction and upon defendants' aforesaid motion to dissolve the aforementioned temporary restraining order granted July 19, 1938, (and continued and extended in full force and effect by the aforesaid order entered August 29, 1938) and to dismiss the said complaint as amended, it is now and hereby ordered, adjudged and decreed that plaintiff's said motion for a preliminary injunction be, and the same is,



hereby overruled, that defendants' said motion to dissolve said restraining order and to dismiss said complaint as amended be, and the same is, hereby sustained, that said temporary restraining order be, and the same is, hereby dissolved, that said complaint as amended be, and the same is, hereby dismissed, and that the defendants recover of the plaintiff the defendants' costs herein incurred and expended, to which rulings of the Court, and each of them, the plaintiff objected, and said objections having been overruled, the plaintiff asked, and is hereby granted, exceptions.

(7) From the statements contained in the plaintiff's verified complaint as amended herein and from the affidavits tendered herein by the plaintiff on July 26, 1938, and ordered filed by the aforesaid order entered August 29, 1938, the Court is of the opinion that plaintiff will lose its transportation contracts mentioned in said complaint, that plaintiff's business described in said complaint will be destroyed, and that irreparable damage will result to the plaintiff pending appeal herefrom to the Supreme Court of the United States if this judgment shall be reversed [fol. 89] upon such appeal, and the plaintiff on October 20, 1938, having announced its intention to prosecute an appeal herefrom to the Supreme Court of the United States and having tendered its motion that it be awarded an injunction pending such appeal, and it appearing that the defendants, including the Attorney General of the Commonwealth of Kentucky, and the Governor of the said Commonwealth have waived notice of the application for said injunction pending appeal and of the hearing thereof, as aforesaid, and defendants having offered no evidence in opposition to said motion and application, and the Court having heard statements of the parties' respective counsel with respect to said motion and application, and having sufficiently considered the matter and being sufficiently advised, it is now and hereby further ordered, adjudged and decreed that plaintiff's said motion for an injunction pending said appeal be, and the same is, hereby ordered filed, that this action be, and the same is, hereby submitted upon said motion, and that said motion be, and the same is, hereby sustained to the extent and upon the conditions hereinafter set forth. Said injunction pending said appeal is hereby allowed and granted if the plaintiff shall execute and file herein a bond, with good and sufficient surety, ap-



proved by the Clerk of this Court, in the penal sum and amount of \$3,000.00, conditioned that the plaintiff will pay to the defendants all costs; losses and damages which may result to defendants from the granting of said injunction if it finally should be determined that the same was improperly granted to plaintiff. Said injunction pending appeal, granted upon the aforementioned condition precedent, is subject to defeasance and nullification, however, if within the time allowed by law, and by the Rules of said Supreme Court, the plaintiff fails to procure allowance of its aforementioned appeal, or, if plaintiff fails within due season properly to file, or to cause to be filed, with the Clerk of [fol. 90] the said Supreme Court the transcript of the record upon said appeal. Said injunction pending appeal, hereby granted upon the terms aforesaid, enjoins and restrains the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, William E. Baxter, Field Representative of the Department of Revenue of the Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, their successors, assistants, deputies and agents—on the ground, or for the reason, that there has not been issued to plaintiff, and that plaintiff does not hold or possess a liquor Transporter's License issued by the Department of Revenue of the Commonwealth of Kentucky or by the Kentucky State Alcoholic Beverage Control Board—from bringing and from threatening to bring, either directly or indirectly, and from permitting to be brought, either directly or indirectly, any civil, criminal, penal or confiscatory action or proceeding, whatsoever, either at law or in equity, for the purpose of enforcing the Alcoholic Beverage Control Law enacted by the General Assembly of the Commonwealth of Kentucky at a Session thereof held in the year 1938, or any provision thereof, against the plaintiff, its officers, representatives,



agents or employees, or any of them; from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic liquors whatsoever, carried and transported in interstate commerce by plaintiff as a contract motor carrier of freight for hire from any point or place in Jefferson County, Ken- [fol. 91] tucky, consigned and destined for delivery to any point or place in the States of Indiana or Illinois, or in any State lying North of the Ohio River; from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them; from causing, and from threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested or prosecuted for violating any provision of said Alcoholic Beverage Control Law; and from taking and from threatening to take, any other action in any manner designed, intended or tending to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives and employees, or any of them, in conducting the aforesaid operations of transport and carriage, or any of them, pending said appeal.

This judgment signed and granted this 22nd day of November, 1938.

Elwood Hamilton, Judge of the United States Circuit Court of Appeals for the Sixth Circuit. Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio. Mac Swinford, Judge of the United States District Courts for the Eastern and Western Districts of Kentucky.

Have seen: Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky; Howell Ellis, 520 Illinois Building, Indianapolis, Indiana; Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Plaintiff.

Have seen: Hubert Meredith, Attorney General; Harry D. France, Assistant Attorney General; William Hayes, Assistant Attorney General; H. Appleton Federa, of Counsel, Frankfort, Kentucky, Attorneys for Defendants.



## [fol. 92] IN UNITED STATES DISTRICT COURT

## PETITION FOR APPEALS TO THE SUPREME COURT OF THE UNITED STATES—Filed January 25, 1939

The plaintiff, Ziffrin, Incorporated, conceiving itself aggrieved by the order and judgment entered in the above entitled action on the 22nd day of November, 1938, by a Statutory Three-Judge Court, convened pursuant to the provisions of Section 266 of the Judicial Code, insofar as said order and judgment overrules and denies the motion of this plaintiff for a preliminary injunction enjoining and restraining the defendants as specified in said motion, and insofar as said order and judgment dissolves the temporary restraining order, and the continuation and extension thereof, heretofore granted, ordered and issued herein, hereby appeals to the Supreme Court of the United States from said order and judgment insofar as the same denies plaintiff's said motion for a preliminary injunction as prayed in said motion and insofar as the same dissolves said restraining order and the aforementioned continuation and extension thereof.

[fol. 93] The plaintiff conceiving itself further aggrieved by the said order and judgment entered herein as aforesaid, insofar as said order and judgment sustains the motion of the defendants herein to dismiss this plaintiff's complaint as amended herein, and insofar as said order and judgment directs the dismissal of said complaint as amended, and insofar as said order and judgment denies to this plaintiff a permanent injunction as prayed by plaintiff in said complaint, and insofar as the said order and judgment adjudges and orders that said complaint be dismissed and that the defendants recover of plaintiff their costs incurred and expended in this action, all of which motions were heard and determined by said Statutory Three-Judge Court, convened as aforesaid, hereby appeals to the Supreme Court of the United States from said order and judgment insofar as the same sustains the aforesaid motion of said defendants to dismiss said complaint and denies to plaintiff a permanent injunction and orders and adjudges that said complaint as amended be dismissed and that defendants recover of plaintiff their costs incurred and expended in this action.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the Assignment of Errors



filed herewith, pertaining to the portions of said order and judgment, therein specifically designated, and from which appeals are prayed as herein set forth.

Plaintiff states that said order and judgment and the several provisions thereof herein and in said Assignment of Errors complained of, and the said Court's aforementioned several decisions and rulings, in the particulars aforesaid are, and each of them is, greatly to the prejudice and injury [fol. 94] of plaintiff, and are, and each of them is, erroneous and inequitable.

Wherefore, in order that plaintiff may obtain relief in the premises and be afforded opportunity to show the errors complained of, plaintiff, Ziffirin, Incorporated, prays that it be allowed appeals in said action and from the aforesaid order and judgment to the Supreme Court of the United States conformably with the Statutes and the Rules of said Supreme Court in such case made and provided, that proper orders touching the security required of plaintiff be made, that a citation be issued upon the allowance of said appeals directed to the defendants herein, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky Alcoholic Beverage Control Board, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, commanding them, and each of them, to appear before the Supreme Court of the United States to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and judgment was made and entered, duly authenticated, be sent to the Supreme Court of the United States.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky. Howell Ellis, 520 Illinois Building, Indianapolis, Indiana. Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky.



[fol. 95] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 25, 1939

The plaintiff, Ziffrin, Incorporated, by counsel, respectfully represents that in the records and in the proceedings had in the above entitled action, in the rendition of the interlocutory orders and decrees herein appealed from, and also in the rendition of the final judgment herein appealed from, substantial errors were committed by the Statutory Three-Judge Court, heretofore convened herein conformably with the requirements of the Judicial Code, Sec. 266, which errors prejudicially affect plaintiff's substantial rights, and for the commission of which errors said judgment in the particulars and aspects referred to should be reversed, and as cause and grounds for such reversal the plaintiff makes the following assignment of errors, upon which plaintiff will rely in the prosecution of the appeals herein petitioned for in this action from the orders, decrees and judgment of this [fol. 96] Court entered in this action on the 22nd day of November, 1938, to-wit:

In the proceedings aforesaid said Court erred as aforementioned in the following particulars, to-wit:

(1) In the rendition of said interlocutory decree,—in denying and overruling plaintiff's motion, filed July 26, 1938, seeking and praying a preliminary injunction;

(2) In the rendition of said interlocutory decree,—in sustaining defendants' motion, filed July 26, 1938, to dissolve the temporary restraining order issued herein on July 19, 1938, and continued and extended by order entered herein on August 29, 1938, by said Statutory Three-Judge Court, by which continuance and extension said restraining order, in effect, was constituted and converted into a preliminary injunction;

(3) In the rendition of said final judgment,—in sustaining defendants' motion to dismiss the complaint as amended, and in thereupon dismissing said complaint and in adjudging that defendants recover their costs;

(4) In determining and ruling, in stating as its conclusions of law, and in making the same the grounds of its action in rendering the aforesaid decisions:—

(a) That the pretended Alcoholic Beverage Control Law of Kentucky, (being Chapter 2, pages 48, et. seq. of the 1938



Session Acts of the General Assembly of the Commonwealth of Kentucky of 1938, and being Carroll's Kentucky Statutes, Section 2554b-97, et. seq., hereinafter for convenience sometimes called merely "Law"), in application to the plaintiff—a contract carrier of freight by motor vehicle for hire, operating with and under the sanction of the Interstate Commerce Commission pursuant to the terms and provisions of Motor Carrier Act, 1935, and engaged in the State of Kentucky solely and exclusively in a long established and profitable business of carrying and transporting from Louisville, Jefferson County, Kentucky, and immediate environs in said Jefferson County, export cargoes of whiskies, liquors and alcoholic beverages there, and in pursuance of the terms of the contracts governing the sales of said intoxicants, delivered to plaintiff by vendor whiskey distillers and other vendors of such intoxicants, having their places of residence and business domicile in said Jefferson County, Kentucky, for transportation and carriage, and carried and transported by plaintiff in continuous and uninterrupted transit, to the consignee-purchasers of said intoxicants at such purchasers' respective places of domicile and residence in Indianapolis, Indiana, and at other points and places lying and situated North of said City of Indianapolis—in declaring plaintiff ineligible to continue to engage in such business, and in providing severe and extreme penalties and punishments for plaintiff, its responsible officers and employees so engaging, and in providing for the seizure and confiscation as contraband of automotive equipment owned, used and employed by plaintiff in such activities and for the seizure and confiscation as contraband of such cargoes so transported, does not contravene the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States;

(b) That said Law, in application to the plaintiff and to the plaintiff's aforesaid business, only remotely and incidentally affects interstate commerce, and that said Law does not represent and constitute a direct and substantial burden upon, interference with, and obstruction and prohibition of [fol. 98] commerce among the several States;

(c) That regulation by the General Assembly of the Commonwealth of Kentucky of the exportation of such intoxicants from Kentucky to sister States by motor carriers of



freight for hire, and said General Assembly's action in prohibiting interstate contract carriers of freight by motor vehicle for hire, including plaintiff, from continuing to engage in such interstate exportation business, is a matter of local concern, as distinguished from a matter of National concern;

(d) That the Congress of the United States, by Motor Carrier Act, 1935, has not legislated with respect to the transportation of such intoxicants in export in interstate commerce by contract carriers by motor vehicle for hire;

(e) That National legislation governing and controlling interstate exportation and exports of the kind and character aforesaid is lacking;

(f) That the supposed omission of the Congress to legislate with reference to the subject of exportation of liquor in interstate commerce by contract carriers by motor vehicle for hire is equivalent and tantamount to an invitation by the Congress to each of the several States to make and enact its own laws governing said field of regulation;

(g) That such intoxicants, sold and consigned by the aforementioned vendors and consignors thereof for delivery to the aforesaid consignee-purchasers thereof domiciled and residing in Indianapolis, Indiana, and in points situated North thereof, and delivered to plaintiff, a contract-carrier of freight by motor vehicle for hire as aforesaid, in Jefferson County, Kentucky, intended and consigned for immediate, continuous and uninterrupted carriage for delivery to said consignees as aforementioned, are not to be regarded as being in interstate commerce or entitled to the protection of said Commerce Clause;

(h) That because it is competent for a State to prohibit the manufacture of such intoxicants; then if such State permits the manufacture thereof it is competent for such State to control such manufactured product, including power to control the transportation thereof in exportation from such State to a sister State in commerce among the several States;

(i) That State police powers should be broadened;

(j) That said Law, in application to plaintiff, and plaintiff's said business, in assuming, as it does assume, to require plaintiff, as a condition precedent to continuing to



engage in said business, to convert itself into a common carrier of freight by motor vehicle for hire, to assume the burdens and liabilities thereof, and to establish to the satisfaction of the Kentucky authorities that plaintiff's said operations are convenient and necessary in the public interest, does not constitute a taking of plaintiff's property without due process of law, and does not contravene the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States;

(k) That said Law's provisions, prohibiting plaintiff, because it is a contract (instead of a common) carrier of freight by motor vehicle for hire in interstate commerce as aforesaid, from continuing to engage in the conduct of its established and profitable and exclusively interstate exportation activities as aforementioned, is a valid and reasonable regulation within the proper exercise of the Police Power of the State;

(l) That said Law in providing, as it does provide, that common carriers of freight by motor vehicle for hire shall be eligible to do and transact the aforementioned business of transporting exports of intoxicants from Kentucky in [fols. 100-140] interstate commerce, and in declaring, as it does declare, contract carriers of freight by motor vehicle for hire, including plaintiff, to be ineligible to engage, or to continue to engage, in said business, and in providing penalties for violations of its provisions so extreme and severe as to preclude resort to the courts in ordinary course, does not deny the plaintiff the equal protection of the laws, and does not contravene the Equal Protection Clause of the aforesaid Fourteenth Amendment: and

(m) That in determining the validity of said pretended Law, it is incompetent for the Court to take cognizance of said General Assembly's obvious and transparent attempt and design to give common carriers of freight by motor vehicle for hire a competitive advantage over contract carriers of freight by motor vehicle for hire, by prohibiting the latter class of motor carriers from continuing to engage in the business aforesaid.

Wherefore, for each and all of the reasons set forth in the within and foregoing assignment of errors, plaintiff, Ziffrin, Incorporated, prays that each of said orders, decrees and



judgment herein appealed from, namely, said interlocutory orders and decrees and said final decree and judgment as hereinbefore set forth, be reversed with directions to the District Court of the United States, for the Eastern District of Kentucky, to set aside and vacate said orders and decrees and said judgment, and in lieu thereof to reinstate said restraining order and to render a decree and judgment in all respect- in accordance with the prayer of plaintiff's complaint as amended herein, and for all such further and equitable relief as to the Court may seem just and proper.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Ky.; Howell Ellis, 520 Illinois Building, Indianapolis, Indiana; Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Ky., Attorneys for Ziffrin, Incorporated, Plaintiff and Petitioner.

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[fols. 141-142] Bond on appeal for \$1,000.00, approved and filed January 25, 1939, omitted in printing.

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[fol. 143] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEALS—Entered and Filed January 25, 1939.

This day came the plaintiff, Ziffrin, Incorporated, by counsel, and tendered its Petition for Appeals to the Supreme Court of the United States from the interlocutory orders and decrees and from the final judgment rendered herein on the 22nd day of November, 1938, by the Statutory Three-Judge Court heretofore convened herein, pursuant to the requirements of Section 266 of the Judicial Code, and plaintiff simultaneously and further tendered its Assignment of Errors in support of its said Petition and its Jurisdictional Statement made in compliance with Paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, together with the Appendices annexed to and referred to in said Jurisdictional Statement and incorporated as parts thereof, and likewise and further tendered its Appeal Bond in the penal sum and amount of One Thousand Dollars [fol. 144] (\$1,000.00) executed by plaintiff as Principal and



by United States Fidelity & Guaranty Co., a corporation, as Surety, and moved that the said papers and documents be filed, that said appeals be allowed, and that proper Citation be issued.

Thereupon, it is ordered by the Court:

(1) That the plaintiff's aforesaid motion be, and the same is, hereby sustained;

(2) That the aforesaid Petition for Appeals, Assignment of Errors, Jurisdictional Statement and Appeal Bond, be, and the same are, hereby filed herein and made part of the record in this action;

(3) That the aforesaid Appeal Bond and the surety thereon be, and the same are, and each of them is, hereby approved;

(4) That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its said Petition for Appeals be, and they are, and each of them is, hereby allowed as prayed in said Petition;

(5) That a transcript of such parts and portions of the record and proceedings herein as the parties may duly designate be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law and by the Rules of said Supreme Court;

(6) That citation be issued admonishing the defendants, and each of them, to be and appear in the Supreme Court of the United States within forty (40) days from this date as provided by law and the Rules of said Supreme Court.

This order signed and granted this 25th day of January, 1939.

(Signed) Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky.

[fols. 145-150] Citation, in usual form, showing service on Hubert Meredith et al., filed January 25, 1939, omitted in printing.



[fols. 151-163] IN UNITED STATES DISTRICT COURT

ORDER FILING ACKNOWLEDGMENT OF SERVICE—Entered and

Filed January 25, 1939

Plaintiff, Ziffrin, Incorporated, having this day tendered and offered to file defendants' acknowledgement of service of copies of plaintiff's Petition for Appeal to the Supreme Court of the United States, Assignment of Errors, Jurisdictional Statement and Order Allowing said Appeal, and of a statement directing defendants' attention to the provisions of Paragraph 3 of Rule 12 of the Rules of said Supreme Court, and the plaintiff having further tendered and moved the Court to file Defendants' Acknowledgment of Service of the Citation issued herein, it is ordered that the defendants' two aforementioned acknowledgments of service of the aforementioned papers and documents be, and the same are, hereby ordered filed as part of the record herein.

This order signed and granted this 25th day of January, 1939.

Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky.

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[fol. 164] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 165] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION OF PARTS OF RECORD TO BE PRINTED BY CLERK, AND PROOF OF SERVICE—Filed February 20, 1939

The appellant, Ziffrin, Incorporated, states that the points upon which it intends to rely upon the prosecution of this appeal are those hereinafter set forth, and that appellant thinks the parts of the record hereinafter identified are necessary for the consideration of the aforementioned points and should be printed by the Clerk as part of the record herein, to-wit:

(A) Points Upon Which Appellant Intends to Rely:

1. The Statutory Three Judge Court below erred in overruling appellant's motion for a preliminary injunction;



2. The Statutory Three Judge Court below erred in sustaining appellees' motion to dissolve the temporary restraining order, and in dissolving the same;

3. The Statutory Three Judge Court below erred in sustaining appellees' motion to dismiss the complaint as amended, and in dismissing the same;

4. The Statutory Three Judge Court below further erred in determining and ruling and in stating as its Conclusions [fol. 166] of Law, and in making said Conclusions of Law the sole and exclusive grounds of said Court's action in rendering the aforesaid decisions, and each of them:

(a) That in application to appellant and its business, the 1938 "Alcoholic Beverage Control Law" of Kentucky complained of herein (hereinafter for convenience sometimes called merely "Control Law") does not contravene the Commerce Clause, Art. 1, Sec. 8, Cl. 3, of the Constitution of the United States;

(b) That in application to appellant and its business, said Control Law only remotely and incidentally affects and burdens interstate commerce, and that said Control Law does not represent and constitute a direct and substantial burden upon, interference with, and obstruction and prohibition of, commerce among the several states;

(c) That the regulation by the General Assembly of the Commonwealth of Kentucky of the transportation of alcoholic liquors by motor carriers of property for hire in export from Kentucky to sister states, and the said General Assembly's action—manifested by said Control Law—in attempting to prohibit interstate contract carriers of property by motor vehicles for hire, including appellant, from continuing to prosecute and to engage in such interstate exportation business, is a matter of local concern, as distinguished from a matter of National concern;

(d) That the Congress of the United States, by Motor Carrier Act, 1935, has not legislated with respect to transportation of said alcoholic liquors by contract carriers of property by motor vehicles for hire in export, in interstate commerce, from the state attempting such regulation;

(e) That National legislation governing and controlling interstate transportation, exportation, and exports, of the [fol. 167], kind and character aforesaid is lacking;



(f) That the supposed omission of Congress—erroneously supposed by the Statutory Three Judge Court below to exist—to legislate with reference to the subject of transportation by contract carriers of property by motor vehicles for hire of alcoholic liquors exported in interstate commerce, is equivalent and tantamount to an invitation by the Congress to each of the several states to enact its own laws governing said supposed open field of regulation;

(g) That such alcoholic liquors sold and consigned by the vendors and consignors thereof, residing, domiciled and having their places of business in the City of Louisville, Jefferson County, Kentucky, and in the immediate vicinity of said City, to be delivered, pursuant to the contracts for the sale of said alcoholic liquors, to the consignee-purchasers of said liquors residing, domiciled and having their places of business in Indianapolis, Ind., Chicago, Ill., and at other points and places situated in states other than Kentucky and lying North of the Ohio River, and delivered to appellant in said City of Louisville, and its aforesaid immediate environs in Jefferson County, Kentucky, intended, consigned and destined for immediate, direct and continuous carriage and transportation for delivery to said consignee-purchasers at their aforementioned places of residence and business location, are not to be regarded as being in interstate commerce, and are not to be regarded as entitled to the protection of the aforesaid Commerce Clause of the Constitution of the United States;

(h) That because it is competent for a state to prohibit the manufacture of such alcoholic liquors, then if a state permits the manufacture thereof, it is competent for said state to control the manufactured product, which includes power to control the transportation thereof in exportation, in interstate commerce as aforementioned, from such state of manufacture to a sister state;

[fol. 168] (i) That state police powers should be broadened;

(j) That said Control Law, in application to appellant and its aforementioned export business, in assuming to require appellant—as a condition precedent to continuing to engage in its said business—to convert itself into a common carrier of property by motor vehicle for hire, to as-



sume the added burdens and stricter liabilities appertaining to such common carriers, and to establish to the satisfaction of Kentucky authorities that appellant's operations are convenient and necessary in the public interest, does not constitute a taking of appellant's property without due process of law, in contravention of the Due Process Clause of the 14th Amendment to the Constitution of the United States:

(k) That said Control Law's provisions prohibiting appellant, merely because it is a "contract" instead of a "common" carrier of freight by motor vehicle for hire in interstate commerce from continuing to engage in the conduct of appellant's aforesaid established, profitable and exclusively interstate business of transporting exports of alcoholic liquors from Kentucky to sister states, is a valid and reasonable regulation within the proper exercise of the police power of the Commonwealth of Kentucky and of its General Assembly;

(l) That said Control Law, in providing that common carriers of property by motor vehicles for hire shall be eligible to transact such business of transporting exports of alcoholic liquors from Kentucky in interstate commerce, and in declaring contract carriers of property by motor vehicles for hire, including appellant, to be ineligible to engage in said business and in said operations of interstate commerce, and, further, in providing penalties for violations of its mentioned provisions so extreme and severe as to preclude resort to the Courts in ordinary course to test the validity of said attempted regulations, does not deny appellant the equal protection of the laws, and does not contravene the Equal Protection Clause of the 14th Amendment to the Constitution of the United States; and

[fol. 169] (m) That in determining the question of the validity and constitutionality of said Control Law it is incompetent for the Court to take cognizance of said General Assembly's attempt and design to give common carriers of property by motor vehicles for hire a competitive advantage over contract carriers of property by motor vehicle for hire, by permitting the former class of motor carriers to engage, and by prohibiting the latter class of motor carriers from engaging, in the aforementioned business of carrying



and transporting from Kentucky exports of said alcoholic liquors in interstate commerce.

(B) Parts of Record to be Printed by Clerk:

1. Bill of complaint, filed July 18, 1938.
2. Amended Bill of Complaint, filed July 18, 1938.
3. Subpoena for Defendants, issued, July 18, 1938, on aforesaid Bill as amended, and Marshal's returns thereon.
4. Two notices of Hearing on Motion for Restraining Order, filed July 19, 1938, and Marshal's returns thereon.
5. Plaintiff's motion for temporary restraining order, filed July 19, 1938.
6. Temporary Restraining Order, granted July 19, 1938.
7. Order, convening Statutory Three-Judge Court, entered July 19, 1938.
8. Designation of Judge Robert R. Nevin.
9. Marshal's returns of service of certified copies of Restraining Order on Governor of Kentucky and defendants.
10. Plaintiff's Motion for preliminary injunction, filed July 26, 1938.
11. Defendants' motion to dismiss complaint and to dissolve temporary restraining order, filed July 26, 1938.
12. Order, extending Restraining Order, entered August 29, 1938.
- [fol. 170] 13. Second Amended Bill of Complaint, filed September 26, 1938.
14. Order, entered September 26, 1938, filing said Second Amended Bill of Complaint.
15. Receipt of defendants for copies of Second Amended Bill of Complaint, filed October 6, 1938.
16. Defendants' Consent to Filing of Second Amended Bill of Complaint, filed October 6, 1938.
17. Entry of Appearance of defendant, William E. Baxter, filed October 6, 1938.
18. Order, entered October 6, 1938, noting of record filing of defendants' receipt for Second Amended Complaint, consent of defendants that Second Amended Complaint be filed, and entry of appearance of William E. Baxter.
19. Joint Motion, that defendants' motion to dismiss complaint and to dissolve restraining order be extended to complaint as amended, including Second Amended Complaint, filed October 10, 1938.



20. Order, entered October 10, 1938, noting of record filing of joint motion that defendants' motion to dismiss complaint and to dissolve temporary restraining order be extended to complaint as amended, including Second Amended Complaint.

21. Opinion, dated and filed, October 15, 1938.

22. Plaintiff's Third Amended Complaint, filed November 22, 1938.

23. Defendants' Acknowledgment of Receipt of Copies of Third Amended Complaint and Consent that said Amendment be filed, filed November 22, 1938.

24. Joint Motion, that defendants' motion to dismiss complaint as amended and to dissolve temporary restraining order, be extended to complaint as amended, including [fol. 171] Third Amendment thereto, filed November 22, 1938.

25. Waiver of Notice, of Governor of Kentucky and of Defendants, filed November 22, 1938.

26. Judgment, entered November 22, 1938.

27. Petition for Appeals.

28. Assignment of Errors.

29. Jurisdictional Statement.

30. Appeal Bond.

31. Order Allowing Appeals, entered January 25, 1939.

32. Citation on Appeal.

33. Defendants' and Appellees' Acknowledgment of Service of Copies of Appeal Papers and of Service of Statement required by paragraph 3 of Rule 12 of Rules of Supreme Court.

34. Defendants' and Appellees' Acknowledgment of Service of Citation.

35. Order, entered January 25, 1939, filing defendants' and appellees' acknowledgments of service.

36. This Statement of Points to be relied upon, Designation of Parts of the Record to be printed by the Clerk, and Proof of Service thereof.

Ziffrin, Incorporated, Appellant, by Norton L. Goldsmith, Attorney for Appellant, 615 Kentucky Home Life Building, Louisville, Kentucky.

### Proof of Service

The appellees named in the record in the above entitled cause and appeal, by counsel, hereby acknowledge that they, this 17th day of February, 1939, have received a copy, and



[fol. 172] have accepted service, of the within and foregoing Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed by Clerk.

Hubert Meredith, Appellee, Attorney General of Commonwealth of Kentucky; Harry D. France, Appellee, Assistant Attorney General of Commonwealth of Kentucky; William Hays, Assistant Attorney General of Commonwealth of Kentucky; H. Appleton Federa, of Counsel, Attorneys for Appellees, All of Frankfort, Kentucky.

[fol. 173] [File endorsement omitted.]

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Endorsed on cover: Enter Norton L. Goldsmith. File No. 43,180. E. Kentucky, D. C. U. S. Term No. 695. Ziffrin, Incorporated, appellant, vs. James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, et al. Filed February 20, 1939. Term No. 695, O. T., 1938.

(1302)



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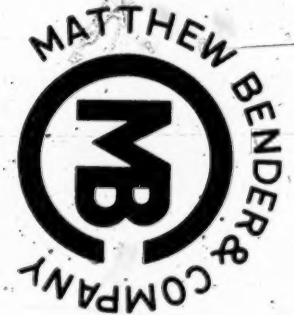


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 695

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ZIFFRIN, INCORPORATED,

*Appellant,*

*vs.*

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE  
COMMONWEALTH OF KENTUCKY, ET AL.,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

NORTON L. GOLDSMITH,  
HOWELL ELLIS,

*Counsel for Appellant.*







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## STATUTES CITED.

Alcoholic Beverage Control Law of Kentucky, being c. 2, pages 48, et seq., of the 1938 Session Acts of the General Assembly of the Commonwealth of Kentucky and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, Section 2554b-97, et seq., pages 175, et seq.

Act of Congress of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827, as subsequently amended, including amendatory Acts of Congress of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, being Sec. 238 of Judicial Code, U. S. C. A., Title 38, Sec. 345 and by Act of Congress of June 18, 1910, c. 309, Sec. 17, 36 Stat. 557, as subsequently amended, including amendatory Act of Congress of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, being Section 266 of the Judicial Code and U. S. C. A., Title 28, Section 380

Constitution of the United States, 14th Amendment

Federal Motor Carrier Act, 1935, Act of Congress of August 9, 1935, C. 498, 49 Stat. 543, U. S. C. A., Title 49, Section 301, et seq.

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Kentucky Motor Vehicle Transportation Act, being c. 104, pages 514, et seq., of the 1932 Session Acts of the General Assembly of the Commonwealth of Kentucky, and being Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-42, et seq., pages 1457 et seq., as amended by Session Acts of the General Assembly of said Commonwealth, 1936, Fourth Extraordinary Session, Chapter 9, pages 105, et seq., and being Section 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, et seq.







**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

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**No. 695**

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**ZIFFRIN, INCORPORATED,**

*Appellant,*

*vs.*

**JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE  
COMMONWEALTH OF KENTUCKY, ET AL.**

---

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.**

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**JURISDICTIONAL STATEMENT.**

**Filed January 25, 1939**

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1. The jurisdiction of the Supreme Court of the United States to entertain these appeals is believed to be sustained by Act of Cong. of March 3, 1891, c. 517, § 5, 26 Stat. 827, as subsequently amended, including amendatory Act of Cong. of February 13, 1925, c. 229, § 1, 43 Stat. 938, being § 238 of Judicial Code, U. S. C. A. Title 28, § 345, and by Act of Cong. June 18, 1910, c. 309, § 17, 36 Stat. 557, as



subsequently amended, including amendatory Act of Cong. February 13, 1925, c. 229, § 1, 43 Stat. 938, being § 266 of Judicial Code and U. S. C. A. Title 28, § 380.

2. The Statute of the Commonwealth of Kentucky, the validity of which is involved and drawn in question, is a certain Statute known as and called "Alcoholic Beverage Control Law of Kentucky", being c. 2, pages 48, *et seq.*, of the 1938 Session Acts of the General Assembly of the Commonwealth of Kentucky and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, § 2554b-97, *et seq.*, pages 175, *et seq.*, hereinafter for convenience sometimes called merely "Control Law". By its terms and provisions said Control Law incorporates and integrates as part thereof certain terms and provisions of the Kentucky Motor Vehicle Transportation Act, being c. 104, pages 514, *et seq.* of the 1932 Session Acts of the General Assembly of the Commonwealth of Kentucky, and being Carroll's Kentucky Statutes, 1936 Edition, §§ 2739j-42, *et seq.*, pages 1487, *et seq.*, as amended by Session Acts of the General Assembly of said Commonwealth, 1936 Fourth Extraordinary Session, Chapter 9, pages 105, *et seq.*, and being § 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, *et seq.*, hereinafter for convenience sometimes called merely "Transportation Act".

The pertinent provisions of said Control Law, and the pertinent provisions of said Transportation Act, integrated by and with said Control Law as aforesaid, are set forth verbatim in Appendices B and C hereto annexed.

3 The interlocutory orders and decrees and the final judgment sought to be reviewed were entered in the above entitled action on the 22nd day of November, 1938, and the application of the plaintiff for appeals therefrom was presented herein on the 25th day of January, 1938.



4. The nature of this case and action, the nature of the rulings of the Court which were such as to bring this case within the jurisdictional provisions relied upon, a statement of the grounds upon which it is contended that the questions involved are substantial, and citations to the cases believed to sustain the jurisdiction, are next set forth under paragraphs hereof indicated (a), (b), (c) and (d), respectively, to wit:

(a) *Nature of the Case.*—The action, instituted July 18, 1938, in the District Court of the United States for the Eastern District of Kentucky, is one in which the plaintiff, Ziffrin, Incorporated, seeks to obtain interlocutory and preliminary injunctions and a permanent injunction, suspending and restraining the enforcement, operation and execution of the aforesaid Alcoholic Beverage Control Law, a Statute of the Commonwealth of Kentucky, by restraining the action of the defendants, who are public officers of said State, in the enforcement and execution of said Statute. The aforesaid suspension and restraint of enforcement and execution of said Statute and the aforesaid injunctive relief are sought upon the grounds of the unconstitutionality of said Statute in that the same in application to the plaintiff contravenes the Commerce Clause of the Constitution of the United States and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto. Said application for said interlocutory injunction was presented to the aforesaid District Court and to the Honorable Mac Swinford, Judge thereof, who thereupon and conformably with the provisions of the Judicial Code, Section 266, called to his assistance a Circuit Judge of the United States and a District Judge to hear and determine said application for said interlocutory and permanent injunctions. Said application for said interlocutory injunction was heard and de-



terminated by said Statutory Three-Judge Court after five (5) days' notice had been given to the Governor and to the Attorney General of the Commonwealth of Kentucky and to the defendants in the action, and the final hearing in said action likewise was had before and was determined by said Statutory Three-Judge Court. The aforesaid orders, decrees and final judgment appealed from denied plaintiff both said interlocutory injunction and said permanent injunction sought in said action, and dismissed said action.

The plaintiff, Ziffrin, Incorporated, is an Indiana corporation, and an interstate contract carrier of freight by motor vehicle for hire, possessed of "grandfather rights" and operating with the sanction and authorization of the Interstate Commerce Commission pursuant to the terms and provisions of Federal Motor Carrier Act, 1935. Act of Cong., Aug. 9, 1935, C. 498, 49 Stat. 543, U. S. C. A., Title 49, § 301, *et seq.* At all times subsequent to January 1, 1935, plaintiff has conducted an established, extensive and profitable business of transporting cargoes of intoxicating liquors, sold by distillers and other vendors having their places of business in Louisville, Jefferson County, Kentucky, and in its immediate environs situated in said Jefferson County, to purchasers domiciled and having their places of business in Indianapolis, Indiana, Chicago, Illinois, and in other places North of Indianapolis, Indiana, for delivery to such purchasers at their respective places of residence and business location and which commodities were transported and delivered by plaintiff to said purchasers pursuant to special contracts of carriage existing between plaintiff and such vendors and vendees. Such of plaintiff's operations as penetrated the territorial confines of Kentucky consisted exclusively in the carriage of interstate exports from Kentucky. In conducting said transport operations, plaintiff used and employed certain Federal Aid Highways, being U. S. Highways Nos. 31, 52 and 41, said



Highways constituting the direct, usual, convenient, and only commercially practical and feasible, motor vehicle route available for said transport operations.

The defendants are the Commissioner of Revenue of the Commonwealth of Kentucky, the Attorney General of the Commonwealth of Kentucky, the members of the Alcoholic Beverage Control Board created by said Control Law, and other persons, all public officers of the Commonwealth of Kentucky charged by law with the duty and responsibility of enforcing said Control Law, which with respect to its license provisions became effective July 1, 1938. Said Control Law prohibits motor carriers from transporting intoxicating liquors within the territorial confines of Kentucky unless said motor carriers hold a liquor Transporter's License issued by said Control Board; further provides that such Transporter's License may be issued only to motor carriers of freight which hold Common Carriers' Certificates issued by the Division of Motor Transportation of Kentucky, and which Common Carriers' Certificates—under the terms and provisions of the aforesaid Transportation Act—are procurable only by motor carriers of freight engaged in the business of common carriers, and which have established to the satisfaction of said Division of Motor Transportation that their operations are convenient and necessary in the public interest.

On July 8, 1938, defendants denied plaintiff's application for such Transporter's License on the ground that on June 30, 1938, said Division of Motor Transportation had denied plaintiff's application for such Common Carrier's Certificate, which last mentioned denial was made and rested upon the ground that plaintiff was not engaged in the business of a common carrier of freight by motor vehicle for hire.



Subsequent to July 1, 1938, defendants threatened to enforce said Control Law's extreme and severe penal, criminal, contraband and confiscatory provisions against plaintiff, its officers, employees, automotive equipment and consigned cargoes, if plaintiff continued to engage in conducting its aforesaid business of carrying interstate exports of liquors from Kentucky. Said threats intimidated plaintiff's aforementioned patrons and customers, who suspended doing business with plaintiff pursuant to said special contracts of carriage. Thereupon, plaintiff instituted this action as aforesaid, wherein plaintiff challenges the validity of said Control Law on the ground that in assuming to deny plaintiff the right to continue to engage in its aforesaid business of transporting exports of liquors from Jefferson County, Kentucky, to points and places situated in Indiana and Illinois as aforesaid in interstate commerce as aforementioned, except upon condition precedent that plaintiff obtain a Common Carrier's Certificate as aforesaid, obtention of which would necessitate (a) that plaintiff convert itself and its business into a common carrier of freight by motor vehicle for hire, and (b) that plaintiff establish to the satisfaction of Kentucky officials that plaintiff's interstate operations are convenient and necessary in the public interest, said Control Law constitutes a direct and substantial burden upon and interference with interstate commerce, deprives plaintiff of its property without due process of law, denies plaintiff the equal protection of the laws, and is in contravention of the Commerce Clause of the Constitution of the United States and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto.

A Statutory Three-Judge Court was duly convened, pursuant to Section 266 of the Judicial Code, to hear and determine the plaintiff's application for a preliminary and



interlocutory injunction, prayed in the complaint, and application and motion for which were filed by plaintiff on July 26, 1938. In said action plaintiff drew in question the constitutionality of said Control Law as aforementioned, sought and applied for interlocutory and permanent injunctions enjoining and restraining the defendants from enforcing, and from threatening to enforce, said Control Law as aforementioned. Plaintiff pressed its said applications for said interlocutory and permanent injunctions to hearing and determination, and plaintiff was denied all such injunctive relief by the aforesaid order, decree and final judgment mentioned in paragraph numbered 3 hereof.

(b) The rulings of the Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon, because said rulings consist in (1) an order overruling and denying plaintiff's motion for a preliminary injunction enjoining and restraining defendants from enforcing said Control Law as specified in said motion; (2) an order dissolving the temporary restraining order theretofore granted and theretofore continued and extended in force and effect, which restraining order so continued and extended had the force and effect of a preliminary injunction, and (3) the order and final judgment of said court sustaining the defendants' to dismiss the plaintiff's complaint, denying plaintiff a permanent injunction enjoining the enforcement of said Control Law as aforesaid, and dismissing the plaintiff's complaint as amended.

(c) The questions involved are substantial in that they, and the action itself, directly and necessarily put in issue the validity and constitutionality of the challenged provisions of said Control Law (integrating with itself as it does, the aforementioned provisions of said Transportation Act) because in application to the plaintiff and its aforesaid



exclusively interstate exportation business, said Control Law prohibits and excludes plaintiff from continuing to engage in said business except upon conditions precedent that plaintiff convert itself into a common carrier of freight by motor vehicle and establish to the satisfaction of said Division of Motor Transportation that its said operations are convenient and necessary in the public interest; and thereby said Control Law constitutes a substantial and direct burden upon, and interference with, commerce among the several States, accomplishes a taking of plaintiff's property without due process of law, and discriminates against plaintiff and in favor of common carriers of freight by motor vehicle without the existence of any proper ground for such differentiation, and thereby violates the Commerce Clause of the Constitution of the United States, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto.

The cases showing the questions involved to be substantial as aforesaid are: *Michigan Pub. Util. Comm. v. Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *Bush & Sons Co. v. Maloy*, 267 U. S. 317, 69 L. Ed. 627; *Frost Trucking Co. v. Railroad Com.*, 271 U. S. 583, 70 L. Ed. 1101; *Smith v. Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Allen v. Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.

(d) The cases believed to sustain the jurisdiction of the Supreme Court to entertain these appeals are: *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445; *Packard v. Banton*, 264 U. S. 140, 68 L. Ed. 596; *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, 68 L. Ed. 975; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *In Re Buder*, 271 U. S. 461, 70 L. Ed. 1036; *Interstate Busses Corp. v. Holyoke Street R. Co.*, 273 U. S. 45, 71 L. Ed. 530; *Clark v.*



*Poor*, 274 U. S. 554, 71 L. Ed. 1199; *Morris v. Doby*, 274 U. S. 135, 71 L. Ed. 966; *Interstate Busses Corp. v. Blodgett*, 276, U. S. 245, 72 L. Ed. 551, *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155; *Kroger Grocery & Baking Co. v. Lewis*, (heard and reported with *Stewart Dry Goods Co. v. Lewis*.) 287 U. S. 9, 77 L. Ed. 135; *Allen v. Galveston Truck Line Corporation*, 289 U. S. 708, 77 L. Ed. 1463; *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 79, L. Ed. 1322; *Bingaman v. Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928; *South Carolina State Highway Department v. Barmwell Bros.*, 303 U. S. 177, 82 L. Ed. 469.

(5) It is claimed that the Statutory Three-Judge Court abused its discretion in denying the interlocutory injunction aforementioned only in that said court erred in holding said Control Law valid and constitutional, despite said Law's inherent infirmities hereinabove specified.

(6) On the 25th day of January, 1939, plaintiff filed in said District Court its petition for appeals from said interlocutory orders and decrees and from said final judgment to the Supreme Court of the United States, its assignment of errors, its appeal bond, with good and sufficient surety thereon, and this Jurisdictional statement, and presented the same to Honorable Mac Swinford, Judge of said District Court, and said District Court thereupon entered an order filing the papers last mentioned, approving said appeal bond and the surety thereon, allowing said appeals, and ordering that citation issue, and said order was duly signed by said Honorable Mac Swinford, Judge of said court, who, upon allowance of said appeals, duly issued and signed proper citation bearing *teste* dated the date last mentioned and citing and admonishing said defendants to appear in the Supreme Court of the United States within forty (40) days from said date to show cause why said orders, decrees and judgment so appealed from should not be corrected.



(7) The plaintiff appends hereto, marked "Appendix A," a copy of the aforesaid Statutory Three-Judge Court's opinion dated and filed October 15, 1938, which by the terms and provisions of the final judgment appealed from has been constituted and made said court's statement of its conclusions of law constituting the sole grounds for the court taking the action and making the rulings and decisions complained of upon these appeals.

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## APPENDIX "A".

## UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, FRANKFORT.

No. 1210.

ZIFFRIN, INCORPORATED, *Plaintiff*,*vs.*JAMES W. MARTIN, etc., *et. al.*, *Defendant*.**Opinion.**Before Hamilton, Circuit Judge, and Nevin and Swinford,  
District Judges.SWINFORD, *District Judge*:

The plaintiff, Ziffrin, Incorporated, filed its bill of complaint against the officers charged with the responsibility of enforcing the liquor control laws of the State of Kentucky, and seeks to enjoin the enforcement of the provisions of the Alcoholic Beverage Control Law of Kentucky.

The defendant filed a motion to dismiss the plaintiff's bill.

The question for determination is the constitutionality under the federal constitution of the Alcoholic Beverage Control Law of Kentucky, enacted at the 1938 session of the General Assembly.

It is alleged that since March 20, 1933, and at all of the times involved, the plaintiff, Ziffrin, Incorporated, has been and is an Indiana corporation, domiciled at Indianapolis, Indiana, authorized by its charter to engage, and actually engaged, in the business of an interstate contract carrier of freight by motor vehicle for hire.

On July 1, 1935, and prior thereto, plaintiff was in bona fide operation as a contract carrier by motor vehicle between Louisville, Kentucky, and Chicago, Illinois, and elsewhere, conducting operations in interstate commerce along and over Federal Aid Highway, U. S. No. 31, from Louis-



ville northwardly. On September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which interstate contract carriers might file applications for permit. Prior to February 12, 1936, plaintiff filed application with the Interstate Commerce Commission for a permit as an interstate contract carrier of freight for the aforementioned territory and route, which application has continued, and now continues, pending and undetermined before the Interstate Commerce Commission, with the consequence under Federal Motor Carrier Act, 1935 (U. S. C. A., Title 49, Sec. 309), that the continuance of plaintiff's operations has been and is lawful.

In October and November, 1936, plaintiff entered into contracts with Schenley Products Company and Joseph E. Seagram & Sons, Inc., and their affiliates, all engaged in the business of whiskey distillers, to transport for hire by motor vehicles consignments of whiskeys to be delivered by said bailors to the plaintiff in Louisville, Kentucky, consigned by bailors for delivery to the consignee-purchasers of said whiskeys at such consignees' places or residence or business location in Chicago, Illinois, and in points other than the State of Kentucky. These contracts have continued to be and are in full force and effect; the plaintiff has carried large quantities of whiskeys pursuant thereto and conformably therewith and plaintiff has done like and similar business with and for other customers.

The direct, convenient and usual motor vehicle route from Louisville to Chicago is via Indianapolis over U. S. Highway No. 31, and that route has been used and employed by plaintiff in its operations.

The transportation of this whiskey has been the principal part of plaintiff's business and that business has been and is an established and profitable one.

The business has been interstate commerce exclusively.

During the year preceding July 1, 1938, plaintiff owned and operated seven trucks, operated a total of twenty-five trucks, employed forty men, and had in the business a capital investment in excess of \$10,000.00.



On March 7, 1938, the Governor of Kentucky approved the Alcoholic Beverage Control Law known as Carroll's Kentucky Statutes, Sec. 2554b-97, *et seq.*

Plaintiff previously had complied with all requirements of Kentucky laws governing licenses, certificates and process agent.

Insofar as its license provisions are concerned, this law became effective July 1, 1938, and it thereupon became incumbent upon plaintiff, if it were to continue its aforementioned business conformably with the terms of the law, to have a Transporter's License. 1938 Supplement to Carroll's Kentucky Statutes Sec. 2554b-190.

Section "18" of the Act, referred to in this Statute is subsection 7 of Section 2554b-114, Carroll's Kentucky Statutes.

In order to be eligible to obtain the Transporter's License from the Department of Revenue, it was necessary for plaintiff to have a common carrier's certificate from the Division of Motor Transportation. 1938 Supplement to Carroll's Kentucky Statutes, Sec. 2554b-154 (7).

On May 25, 1938, plaintiff applied for a Liquor Transporter's License, paid the required fee, and with surety executed the bond required therefor, and on June 7, 1938, plaintiff applied to Division of Motor Transportation for a common carrier's certificate to operate a motor freight line from Louisville, Kentucky, to the Indiana State line over U. S. Highway No. 31, and in interstate commerce only.

On or about June 30, 1938, plaintiff's application for a common carrier's certificate was denied; plaintiff thereby was rendered ineligible to obtain or to receive a Transporter's License and on July 8, 1938, the Commissioner of Revenue and the Alcoholic Beverage Control Board denied the application for a Transporter's License on the ground that it did not hold a common carrier's certificate.

The Bill charges the law to be unconstitutional insofar as it assumes to bar plaintiff from engaging in interstate commerce as a contract carrier. The Bill, as amended, charges the law to contravene the Commerce Clause, the Due Process and Equal Protection Clauses.



Counsel for the plaintiff contend that this statutory three judge court has no jurisdiction to entertain the motion to dismiss. An examination of the cases cited to support this plaintiff's claim reveals that two of them were decisions rendered before Section 266 of the Judicial Code (Title 28 U. S. C. A. Sec. 280) was amended in 1925. This amendment added the last sentence to Section 266 of the Judicial Code (28 U. S. C. A. § 380), which is as follows: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The amendment expressly states that the three judge court must sit in final hearing and hence grant a final decree.

The Supreme Court, in the case of *Stratton, etc. v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 14, said: "By the amendment of February 13, 1925 (43 Stat. 938); the provision with respect to the presence of three judges was made to apply to the final hearing in such suit in the District Court, and from the final decree, granting or denying a permanent injunction, a direct appeal lies to this court." \* \* \* "These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by these judges on the application for an interlocutory judgment."

Under the Act, as amended, the three judge court has the same power as a single district judge. It is in fact a district court composed of three judges instead of one. One of the questions for determination is the sufficiency of the pleadings to state a cause of action. The only way in which this can be determined is to decide whether or not the Kentucky Statute is constitutional.

We are of the opinion that this three judge court has authority to rule upon this motion to dismiss.

If this Act of the Kentucky Legislature does not violate the guarantees under the federal constitution to those engaged in interstate commerce it is valid only because it is a



reasonable exercise of the police power of the sovereign State of Kentucky.

The legislature determines what regulations are proper and necessary in the exercise of the police power and it is not for the courts to pass upon the wisdom, policy or expediency of the laws passed in exercising this sovereign power. *Halter v. Nebraska*, 205 U. S. 34. In this case Mr. Justice Holmes in the opinion laid down the basic rule of construction in the following language: "In our consideration of the questions presented we must not overlook certain principles or constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

It then becomes the duty of the courts to determine what are proper subjects for the exercise of this power, what constitutional restrictions and limitations must be applied and whether the statute in question is a reasonable exercise of the power. In this connection the courts may apply certain tests to the legislation and may judicially determine whether the law has a real and substantial relation to the public welfare, safety and health and actually tends in some real degree to promote these objects. *Mugler v. Kansas*, 123 U. S. 623.

The basis of the police power lies in the constitution which regards the public welfare, safety and health of the citizens of that state. However, a close examination of the authorities will show that whenever there is a conflict between the police power and the constitution the courts will construe the constitution to fit in with the police regulations if at all reasonable.



In the case of *Townsend v. Yeomans*, 301 U. S. 441, the court said: "The case calls for the application of the well established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U. S. 493, 510; *Carey v. South Dakota*, 250 U. S. 118, 122; *Lehigh Valley R. Co. v. Public Utilities Comm'n*, 278 U. S. 24, 35; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm'rs*, 283 U. S. 380, 392, 393; *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 158."

The expressly granted power of the federal government to regulate interstate commerce and the power of the individual states to enact regulations for their internal police are coordinate powers which each must respect. The states jealously guard the prerogative duty of protecting the public safety, health and morals. Courts have consistently recognized this right. Necessarily the progress of time has broadened rather than limited the construction placed upon the commerce clause of the Constitution. The fundamental law vitalized by the vigorous opinion of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton 1, has been consistently adhered to and extended. In the light of intervening events any other interpretation would appear almost absurd. If progress is to continue future generations looking back upon this period must find the courts equally as farsighted and practical.

The Courts with equal consistency have respected the right of the states as the proper governmental agency, to enact and enforce reasonable police regulations. Under our dual system of government both are equally necessary and must be preserved entire, but neither can be so exercised as to materially affect or encroach upon the other. State laws, not primarily aimed at commerce, but intended as legitimate exertions of the authority of the state to provide for the public safety, health and morals of the



citizens of that state are not invalid because they may remotely or incidently impose restrictions on interstate commerce. *Sherlock v. Alling*, 93 U. S. 99.

The question whether the power of Congress to regulate interstate commerce is exclusive or whether the states have a concurrent authority to any extent, over the same subject is the most difficult which has arisen in the construction of this clause of the Constitution. An examination of the authorities might reveal a division into four classes of guiding rules.

First the states cannot lawfully enact measures tending directly to regulate, obstruct or interfere with such commerce as is confided to the paramount control of Congress or which may be inconsistent with the legislations of Congress on the same subject. I think it is within this first class that the Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 57 L. Ed. 1511, cited by counsel for plaintiff fall. See opinion giving many illustrations.

Second, if the particular subject to which the power is to be directed is national in its character or is such that it can properly be regulated only by a uniform system, to such an extent that varying regulations by the individual states would cause inconvenience and be a detriment, it is not competent for the states to legislate on the subject, and if Congress does not act, its silence is to be taken as an evidence of its will that the subject shall be free from all regulation and restriction.

The rule is laid down in the case of *Sligh v. Kirkwood*, etc., 237 U. S. 52, 58. "That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities



is unnecessary. See the Minnesota Rate Cases, 230 U. S. 352."

The same rule of law is emphasized in the more recent case of *Townsend v. Yeomans*, *supra*, in which it was said: "We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, it has not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people."

Third, state legislatures may regulate matters local and limited and which are most likely to be wisely provided for by such diverse rules as the authorities of the different states may deem applicable to their localities and on which Congress has not expressly legislated. *Cooley v. Board of Wardens*, etc., 12 How. 299; *United States v. Adair*, 152 Fed. 727.

Fourth, there are certain classes of state legislation which, although they may incidentally or remotely affect interstate commerce, are not intended as regulations thereof, but have their primary concern for the public health, safety, and welfare of the citizens of the particular state and which are properly in the nature of police regulations. If these laws are reasonable and bona fide and there is no Act of Congress expressly covering the same ground, they are valid. And it is understood that in so far as they relate to or affect commerce Congress, by refraining from acting on the same subject, sanctions and adopts them. It is within this fourth class, if any, that the case at bar falls.

By the Webb-Kenyon Act, 27 U. S. C. A. 122, passed in 1913, Congress recognized a condition which only national legislation could meet. To prevent the importation of liquor from a "wet" state into a "dry" state an adequate and complete law was enacted.

Prior to this in 1890, Congress had enacted the Wilson Act, 27 U. S. C. A. 121.

From these enactments and the construction placed upon them by the courts it is seen that Congress has carefully considered the interstate shipment of liquor and has ex-



pressly avoided enacting legislation dealing with the shipping of liquor out of a state as is the case at bar.

Counsel for the defendants insist that this case is covered by the wording of the Webb-Kenyon Act.

This Act provides: "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The defendants insist that this language expressly gives the states a right to enact legislation pertaining to the exportation of liquor and cite as their authority the case of *Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 Alt. 590, 110 A. L. R. 919.

In this case the Pennsylvania court construed the Webb-Kenyon Act as giving this right to the states in express terms. In the opinion it said: "While the Webb-Kenyon Act was primarily aimed at the importation of intoxicating liquors into a state, in violation of the laws of that state, it also includes in express terms the interstate transportation of all liquor 'in any manner used \* \* \* in violation of any law of such State.'" 27 U. S. C. A. § 122. We have no doubt of the state's power to condemn and forfeit both the liquors so unlawfully transported and the vehicle used in such unlawful transportation."

With this construction of the Webb-Kenyon Act we cannot agree. This Act was passed in our judgment to deal wholly with importation.



It is interesting to note the history of this class of federal legislation. In 1887 the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company*, 125 U. S. 465, laid down the rule that a statute of a state prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, under a license from a county court of the State, is, as applied to a sale by the importer, and in the original package or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states.

This was followed in 1889 in the case of *Leisy v. Hardin*, 135 U. S. 100.

In 1890, apparently as an outgrowth of these two decisions, Congress enacted the Wilson Act, 27 U. S. C. A. 121, which provides as follows: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Following this was the Webb-Kenyon Act in 1913. This Act was held not to have been repealed by the National Prohibition Act nor the Eighteenth Amendment under which it was enacted, in *McCormick & Co., v. Brown*, 286 U. S. 131, 52 Sup. Ct. 522; 76 L. Ed. 1017; 87 A. L. R. 448.

The Twenty-first Amendment provides in Section 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In the light of the authorities cited, it can well be reasoned that where Congress has legislated upon importation,



had this important subject before committees and under debate and deliberately failed to enact legislation dealing with exportations in interstate commerce it has thereby deliberately invited each state to make its own laws governing this particular field evidently acutely conscious of the fact that each state was better qualified to give its own citizens the character of laws which applied to the local problems.

This is a most practical matter and must be dealt with in a practical way.

Modern means of transportation are so efficient that state police powers should be broadened rather than more narrowly confined. What is a reasonable regulation today may have been an unreasonable regulation in the days of dirt roads and horse drawn vehicles.

With broad, well paved highways and high powered motor vehicles, with airplanes and open airways, by both means of which large quantities of intoxicating liquors can be transported across state lines in a short space of time, it becomes a practical impossibility to accurately check the output of plants engaged in its manufacture. It cannot therefore be said to be unreasonable to require its transportation to the state line by regularly engaged transportation services, with fixed termini and maintaining definite schedules for handling shipments of goods. While it may be suggested and has been inferred by plaintiff's counsel that this law was enacted to give some particular class engaged in the transportation business an advantage over those of the same class as his client, this cannot be said to reflect upon the reasonableness of the regulation itself. We must presume that the legislature sought to enact a measure which it believed to be for the good of the state and its citizens, and are here called upon to pass upon the constitutionality of the legislation, not upon the motives of the majority of the members of the legislature and the Governor who signed the bill.

The cases cited by counsel for the plaintiff and relied upon by them treat principally with the general rules of interstate commerce. We think it is well for us to confine ourselves to the cases dealing with the particular



product involved herein. That of alcoholic beverages. The celebrated case of *Mugler v. Kansas*, 123 U. S. 623, emphasizes this fact. The Supreme Court in its opinion reviewed many authorities and had this to say: "In the License Cases, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police power. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

Here is a product which is generally recognized by its nature to be peculiarly subject to regulation under the police power. It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce and must be regulated by some authority. There is no federal regulation. There is no Act of Congress prescribing the method or agency through which it may be transported over the highways or rights-of-ways within the borders of the state. The lack of national legislative control is conspicuous.

We think the language of the Supreme Court in the case of *Sherlock v. Alling*, etc., 93 U. S. 99, might be applied to the case at bar. "In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their sound-



ness is not questioned. But, upon examination of the cases in which they were rendered it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or executed a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

Further on in the opinion the Court said: "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit."

"That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never been doubted. On all grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the decision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such



prohibition to particular parts of the state at their option, laws licensing the traffic in liquors, regulating or prohibiting the sale on certain days or in certain places or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales." Black's Constitutional Law, Third Series, pg. 402.

Since intoxicating liquor is universally recognized as a legitimate subject over which the states may exercise their police power, even to the extent of denying the right to manufacture, it cannot be consistently held that they may permit it to be manufactured, but then lose complete control of what is done with it.

If the state can arbitrarily grant or withhold the right to manufacture liquor on the theory that the nature of the product was something that authorized strong regulation, then that regulation should certainly continue so long as the admittedly dangerous element is within the borders of the state. It does not lose its dangerous element by being merely labeled for exportation to a foreign state or country, even though it might incidently interfere with interstate commerce.

It is an absurdity to say that Kentucky can control its liquor output but cannot control its distribution. The reason for one applies with triple force to the other. There are hundreds of independent trucks operating in Kentucky under a contract carrier's license. They have no schedule, no fixed route, and no definite termini. It would be an impossibility to determine the quantity or destination, whether within or without the State of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor. Assuming that liquor, uncontrolled, is a dangerous element to the health, morals and welfare of the citizens of Kentucky, there appears no greater means by which Kentucky could mistreat her citizens than to permit the manufacture and sale of liquor but have nothing to say about its handling while within the borders of the state.



The Pennsylvania Supreme Court, in the case of *Commonwealth v. One Dodge Motor Truck*, *supra*, in this connection said: "The foregoing decisions leave no doubt that the Commonwealth of Pennsylvania has the power to prohibit the manufacture of alcoholic liquors within its borders. And this is so, even though such liquors are intended for shipment only out of the state. *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. The power to prohibit absolutely includes the power to prohibit conditionally, or to impose reasonable regulations or conditions on such manufacture. *Eberle v. Michigan*, 232 U. S. 700, 34 S. Ct. 464, 58 L. Ed. 803; *Com. v. Vigliotti*, 271 Pa. 10, 115 A. 20, affirmed *Vigliotti v. Pennsylvania*, 258 U. S. 403, 42 S. Ct. 330, 66 L. Ed. 686; *Com. v. Stofchek*, *supra*. "The greater power includes the less."—*Seaboard Air Line Ry. v. North Carolina*, *supra*. It is common knowledge that the successful administration of statutes prohibiting or regulating the traffic in intoxicating liquors depends on the ability of the state to enforce them; and the state's success in enforcing such laws is in direct proportion to its ability to control the transportation and delivery of the liquors. The state will have comparatively little trouble in enforcing its statutes prohibiting the manufacture, sale, and possession of illegal or bootleg liquors, if it can control their transportation and delivery; and the transportation and delivery by automobiles, motor-trucks, and motor vehicles constitute the greatest difficulty. This was recognized by the Supreme Court of the United States in *United States v. Simpson*, *supra*, where the opinion writer, Mr. Justice Van Devanter, said, speaking of the "Reed Amendment", *supra*: "Had Congress intended to confine it to transportation by railroads and other common carriers it may well be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit." 252 U. S. 465, at page 467, 40 S. Ct. 464, 64 L. Ed. 665, 10 A. L. R. 510."



We are of the opinion that this is a valid and reasonable regulation under the police power and does not contravene the Commerce, Due Process or Equal Protection Clauses of the Federal Constitution.

The action should be dismissed.

(Signed)

MACSWINFORD,

*Judge, Eastern & Western Districts of Kentucky.*

## APPENDIX "B".

Pertinent provisions of: ALCOHOLIC BEVERAGE CONTROL LAW OF KENTUCKY (being Chapter 2, pages 48, et seq., of 1938 Session Acts of General Assembly of the Commonwealth of Kentucky, approved and effective March 7, 1938, and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, Sec. 2554b-97, et seq., pages 175, et seq.).

"§ 1. Short Title.—This Act shall be known and may be cited and referred to as the "Alcoholic Beverage Control Law."

"§ 2. (1). 'Alcohol' means and includes ethyl alcohol, hydrated oxide of ethyl or spirit of wine, from whatever source or by whatever process produced.

(2) 'Alcoholic Beverage' or 'Beverage' means and includes alcoholic spirits, liquor, rum, wine, beer, ale, porter, stout, and every liquid or solid patented or not, containing alcohol in an amount in excess of that now permitted or that may hereafter be permitted under Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, and capable of being consumed by a human being and every spurious or imitation liquor sold as, or under any name commonly used for alcoholic beverages, whether containing any alcohol or not. Provided that there is excepted from this definition of alcoholic beverages the following products if they are unfit for use for beverage purposes: (a) medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, national formulary or the



American Institute of Homeopathy; (b) patented, patent and proprietary medicines; (c) toilet, medicinal and antiseptic preparations and solutions; and (d) flavoring extracts and syrups.

(4) 'Board' or 'State Board' or similar abbreviation used herein means the Kentucky State Alcoholic Beverage Control Board created by this Act.

"(10) 'Commissioner' means the Commissioner of Revenue of the Commonwealth of Kentucky."

"(12) 'Department' means the Department of Revenue of the Commonwealth of Kentucky."

"(16) 'Field Representative' means and includes all employees or agents of the Department of Revenue who are regularly employed and whose primary function is to travel from place to place for the purpose of visiting taxpayers and all employees or agents of said Department who may be assigned, temporarily or permanently, by the Commissioner to duty outside of the main office of the Department at Frankfort, in connection with the administration of this Act."

"(17) 'License' means and includes any license issued pursuant to this Act."

"(18) 'Licensee' means and includes any person to whom a license has been issued pursuant to this Act."

"(19) 'Liquor' means and includes all alcoholic beverages."

"(22) 'Person' means and includes individual, partnership, joint stock company, business, trust, association, corporation or other form of business enterprise, including a receiver, trustee or liquidating agent."

"(28) 'Spirits' or 'Distilled Spirits' means and includes any product capable of being consumed by a human being which contains alcohol in excess of the amount now permitted or that may hereafter be permitted by Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, obtained by distilling,



mixed with water or other substances in solution, except wine as herein defined."

"§ 3. Functions.—The administration of this Act and the regulation of the traffic in alcoholic beverages in this Commonwealth is hereby vested in the Department of Revenue."

"§ 4. Organization.—(a) The administration of this Act in relation to traffic in distilled spirits and wine shall be in charge of a distilled spirits unit, under the supervision of the Commissioner of Revenue. (b) The administration of this Act in relation to traffic in malt beverages shall be in charge of a malt beverage unit, under the supervision of the Commissioner of Revenue."

"§ 5. Administrators: Salaries.—The distilled spirits unit and the malt beverage unit shall each be headed by an Administrator appointed by the Commissioner of Revenue. The salaries of said Administrators shall be fixed by the Commissioner of Revenue in accordance with Section 4618-154 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition, and they shall be exempt from the test provided for in Section 4618-90 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition."

"§ 6. Powers and Duties of Administrators.—The Administrators, subject to the supervision and control of the Commissioner, shall exercise severally any of the functions, powers and duties conferred upon the Department by law, which the Commissioner may delegate to them. The Administrator of the distilled spirits unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in distilled spirits and wine; and the Administrator of the malt beverage unit shall have authority to issue or refuse to issue any license provided for in the Act authorizing traffic in malt beverages."

"§ 7. Alcoholic Beverage Control Board: Creation; Functions; Limitations.—The Kentucky Tax Commission shall constitute the Alcoholic Beverage Control Board, which shall have the following functions, powers and duties;

(1) To adopt reasonable regulations governing the conduct of its own business and the procedure relative to appli-



cations for and revocations of licenses and relative to all other matters over which the Board is given jurisdiction by this Act, and for the supervision and control of the manufacture, sale, transportation, storage, advertising, and trafficking of alcoholic beverages throughout the Commonwealth. Such rules and regulations need not be uniform in their application, but may vary in accordance with reasonable classifications.

(2) To limit in its sound discretion the number of licenses of each kind or class to be issued in this Commonwealth or within any political subdivision thereof, and to restrict the locations of licensed premises. To this end the Board may divide and subdivide this Commonwealth or any political subdivision thereof into sections or districts, provided the classification be reasonable, and the rules and regulations relating to the granting, refusal and revocation of licenses may be different within the several divisions or subdivisions so created." \* \* \*

"§ 9. Powers of Members, Officers and Employees.—The Administrators and all Field Representatives shall have full police powers such as are now vested in sheriffs and other peace officers, provided the jurisdiction of said Administrators and Field Representatives shall be co-extensive with the boundaries of the Commonwealth. They shall have authority to inspect or examine any premises where alcoholic beverages are manufactured, sold, stored or otherwise trafficked in, without first having obtained a search warrant; and shall have authority to confiscate any contraband property."

"§ 13. Legal Counsel for Board.—The Attorney General of this Commonwealth shall, subject to the approval of the Commissioner of Revenue, appoint an additional assistant Attorney General whose sole duty shall be to act as legal counsel for the distilled spirits unit and the malt beverage unit. The Assistant Attorney General appointed under this section shall be paid from the Department of Revenue appropriation, an annual salary not to exceed four thousand dollars."



“§ 18. Expiration Date of Licenses; License Taxes.—All licenses issued under this Act shall expire on June 30th of each year. There shall be the following kinds of licenses, each of which shall be printed so as to be readily distinguishable from each other, to wit: . . .

(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum.”

“§ 27. Business Authorized Under a Transporter's License.—A Transporter's License shall authorize the holder to transport distilled spirits and wine to, or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case are authorized by law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be.”

“§ 33. Applications for Licenses; Issuance of Same.—Applications for any license provided for in section 18 of this Act shall be made to the Administrator of the Distilled Spirits Unit at his office in Frankfort, Kentucky; shall be in writing on forms furnished by the Department of Revenue, and verified; and shall set forth in detail such information concerning the applicant and the premises for which the license is sought as this Act or the State Board shall by regulation require. Said application shall be accompanied by a certified check, or cash, or a postal or express money order for the amount of money required by this Act for a license of the kind applied for. If the Administrator shall grant the application he shall issue the proper license in such form as shall be determined by the State board by regulation, subject to the provisions of section 38 of this Act. No license except those provided in sub-sections 6 and 8 of section 29 of this Act shall be issued in less than twenty days or delivered in less than thirty days from the time the application and remittances were received by the Department of Revenue.”

“§ 52. No Traffic in Alcoholic Beverages Save Under License.—It shall be a criminal offense for any person to



manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport or otherwise traffic in alcoholic beverages without first having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said person shall be required to pay said license for the full year notwithstanding that no license shall be issued, together with a penalty equal to twenty (20) per cent of said license tax."

"§ 53. Declaring Certain Property Contraband; Providing for Its Disposition.—The following property is hereby declared to be contraband;

. . . . .

(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act.

. . . . .

(6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages.

Any peace officers, including the Administrators, and field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Control Board, subject to the right of any owner or lienor of property in sub-section six above, whose lien is of record to intervene and establish his rights.



in such property by providing that the property was being used in connection with traffic in alcoholic beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being bona fide shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as contraband in connection with the arrest of the defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board."

"§ 54 (7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

"§ 89. Transportation by Non-Licensee Prohibited; Exception.—No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."



"§ 94. Penalties for Trafficking in Alcoholic Beverages Without a License.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction; shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than \$500.00 and not to exceed \$10,000.00 or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

"§ 95. Penalties for Violations of Other Sections of this Act.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this Act other than section 52 or sections 104 to 117 inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail or workhouse for a term not to exceed six months; or by both such fine and imprisonment. For a second and each subsequent violation of the provisions of any section of this Act other than section 52, whether the section violated be that for which the first conviction was had or not, the offender, upon conviction, shall be punished by a fine not to exceed \$1,000 or by imprisonment for a term not to exceed one year, or by both such fine and imprisonment. The penalties provided for in this section shall be in addition to the revocation of the offender's license; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer or officers responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 10 of this Act."



"§ 119: Transfer of Functions and Resources of Division of Alcoholic Control from the Department of Business Regulation to the Department of Revenue. The functions of the Division of Alcoholic Control of the Department of Business Regulation are hereby transferred to the Department of Revenue. All books, papers, records, files, office equipment, other property and pending business of the said division are likewise transferred to and vested in the Department of Revenue. All employees whose functions are by this Act transferred to and vested in the Department of Revenue are hereby transferred, with their functions, to the said department. The remainder of the appropriation made for the operation of the Division of Alcoholic Control is hereby transferred to and vested in the Department of Revenue to be used for the administration of this Act. In connection with the transfer of the functions of the Division of Alcoholic Control of the Department of Business Regulation to the Department of Revenue, the said Department of Revenue shall be in every way the successor with respect to such functions, and to every act done in the exercise of such functions by or under the authority of the said division. In every instance in which the said division is referred to or designated in any law (not hereby repealed), contract or document, such reference or designation shall be deemed to refer to the Department of Revenue."

"§ 123. Declaring an Emergency.—The present uncertainty with respect to the law governing the sale, distribution and use of alcoholic beverages constitutes an emergency, and this Act shall become a law and be effective on its passage and approval by the Governor. Provided, however, that section 70 of this Act shall become effective as provided by the Constitution of Kentucky in the absence of a declaration of emergency; and provided further, that nothing in this Act shall be construed to require any licensee engaged in traffic in alcoholic beverages to pay any additional license tax, or procure any license hereunder, prior to the procurement of the license for the fiscal year 1938-39."



## APPENDIX "C".

Pertinent provisions of KENTUCKY MOTOR VEHICLE TRANSPORTATION ACT OF 1932, AS AMENDED (being Chapter 104, pages 514, et seq., of 1932 Session Acts of General Assembly of the Commonwealth of Kentucky, approved March 17, 1932, and being Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-42, et seq., pages 1457, et seq., as amended by Session Acts of General Assembly of the Commonwealth of Kentucky, 1936 Fourth Extraordinary Session, Chapter 9, pages 105, et seq.; approved January 18, 1937, effective April 17, 1937, and being Section 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, et seq.)

"§ 2739j-42. Definitions.—(a) 'Motor Vehicle' means any motor propelled vehicle, not usually operated over or on rails, or not propelled by electric power obtained from overhead wires, while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the limit of any municipality; used for the transportation on the public highways of this State of persons or property for hire, and shall include any such vehicle operated as a unit in combination with other vehicles for any such purpose;

"(b) 'Operator' means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver, appointed by any court whatsoever owning, controlling, operating or managing any motor vehicle used for the transportation of persons or property for hire;

"(c) 'Common Carrier' means any operator of a motor vehicle for hire in common carriage;

"(d) 'Contract Carrier' means any operator of a motor vehicle for hire other than a common carrier. 'Contract carrier' shall not be construed to mean or include any person, firm or corporation who transports only his own property, or who does not engage in the transportation business but makes occasional or casual trips to transport persons or the property of others for hire;



"(e) 'Public Highways' means every public street, alley, road or highway in this State, whether within or without the corporate limits of any municipality;

"(f) 'Certificate' means the certificate of public convenience and necessity authorized to be issued under the provisions of this Act;

"(g) 'Permit' means the permit to operate authorized to be issued under the provisions of this Act;

"(h) 'Commission' means the State Tax Commission of Kentucky."

"§ 2739j-45. Certificate necessary.—No common carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a certificate from the Commission."

"§ 2739j-46. Application for certificate, form, oath.—Every application for a certificate shall be made in such form and contain such matters as the Commission may prescribe, and shall be made under oath, signed by the applicant; or, if the applicant be not a person, then by a person having knowledge of the matters therein set forth and duly designated for that purpose by the applicant."

"§ 2739j-47. Granting certificates, procedure.—Upon the filing of any such application and the payment of the fee hereinafter prescribed, the Commission shall, within a reasonable time, fix the time and place for a hearing thereof. A written notice of such hearing, and of the right to file a protest in accordance with said Commission's requirements, shall be mailed by said Commission at least ten (ten) days before the hearing of such application to the applicant, to all common carriers (including steam and electric railway companies) serving any part of the route to be served by the applicant, to the Chairman of the State Highway Commission, to the county attorney and county judge of each county in which the applicant proposes to render service, and to any other person, firm or corporation who may, in the opinion of the Commission, be interested in or affected by the issuance of said certificate."



"§ 2739j-48. Hearing; protests may be filed.—At the time fixed in such notice, or at such time thereafter as the Commission may determine, a public hearing upon said application shall be held by said Commission. Any person, firm or corporation having an interest in the subject matter shall have the right, in accordance with the rules and regulations prescribed therefor by said Commission, to file a protest to the granting, in whole or in part of said application, to make representations, and to introduce evidence in support of said protest."

"§ 2739j-49. Issuing certificate; conditions may be attached; public hearing not necessary, when.—After such hearing the Commission shall have the power to issue to the applicant a certificate, in the form to be prescribed by said Commission, declaring that the public convenience and necessity require the operation for which application is made, or refuse to issue the same, or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by such certificate such terms and conditions as, in its judgment, the public convenience and interest may require; provided, however, if no protest to the granting of the certificate be filed with said Commission prior to the date fixed for the hearing, and if said Commission is satisfied that the privilege sought by the applicant is convenient and necessary in the public interest the certificate may be granted without a public hearing."

"§ 2739j-50. Matters to be considered in granting or refusing certificate.—In granting or refusing to grant such certificate, the Commission shall take into consideration the effect that the proposed operation may have upon public transportation business and facilities of every character with the territory sought to be served by the applicant, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, and the effect upon the highways and upon the safety of the public using such highways that will probably result from the granting of such application."

"§ 2739j-51. Convenience and necessity to public necessary; preference to certain operators.—No such certificate



shall be issued until the applicant has established to the satisfaction of the Commission, upon consideration of the matters mentioned in the preceding section, that the privilege sought by the applicant is convenient and necessary in the public interest. If two or more operators who have been engaged in the transportation of property for compensation, before this act becomes effective, apply for a certificate authorizing them to perform substantially the same service in the same territory under similar conditions, and if the said Commission shall be of the opinion that, in accordance with the provisions of this Act, certificates should be granted to some but not all of such applicants, preference shall be given to the operator or operators who have been longest engaged in such service, provided such service has been rendered in accordance with the requirements of the law."

"§ 2739j-54. Powers and duties of commission.—The Commission shall have the power and authority, by general order or otherwise, to prescribe rules and regulations governing common carriers; it shall have authority to fix or approve the rates, fares, charges, classifications, rules and regulations of each such common carrier, to regulate operating schedules so as to insure adequate and convenient transportation service, to prescribe a uniform system and classification of accounts to be used, to require the filing of annual and other reports, and to supervise and regulate such common carriers in all other matters in which the public interest is involved."

"§ 2739j-55. Abandonment or change of route.—No common carrier shall abandon or change any route or service without an order of the Commission that public convenience and necessity permit such abandonment or change. Applications for any such abandonment or change shall be made in accordance with the requirements of said Commission, and the procedure on an application for an abandonment or change of route shall be the same as herein provided for the issuance of a certificate; provided, however, if it becomes necessary on account of the condition of the roads or other emergency, temporary changes in route, service and schedules may be made."



"§ 2739j-56. Rates to be reasonable.—Every rate demanded or received by any common carrier shall be just and reasonable."

"§ 2739j-57. Adequate service to be furnished.—Every common carrier shall furnish adequate, efficient, safe and reasonable service."

"§ 2739j-58. Schedule of rates etc., to be filed; open to public inspection.—Under such rules and regulations as the Commission may prescribe, every common carrier shall maintain on file with said Commission a schedule of the rates, fares, charges and classifications, if any, and a time schedule, if any, of all motor vehicles operated under the authority of said Commission, and shall keep open for public inspection at designated offices so much of said schedules, rates, fares, charges and classifications, as well as time schedules, as said Commission may deem necessary for public information."

"§ 2739j-59. Regular rates to be charged; refunds not permitted.—No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with and approved by said Commission and in effect at the time; nor shall any company refund or remit in any manner or by any device any portion of the rates, fares or charges so specified, nor make or give any unreasonable preference or advantage to any person; nor subject any person to any unreasonable prejudice or discrimination."

"§ 2739j-61. Fixing rates.—If the Commission, after a hearing held after reasonable notice upon its own motion or upon complaint, finds any existing rate or rates to be excessive, unreasonable or unjustly discriminatory, or the services rendered or the facilities employed by any common carrier to be unsafe, inadequate, inconvenient or in any wise in violation of law or the rules and regulations of said Commission, it may determine the just and reasonable rates to be charged thereafter, or the reasonable, safe,



convenient and adequate service to be thereafter furnished, and shall fix the same by order; provided, however, that nothing in this Act shall be construed to require the Commission to fix the same rates for motor carriers subject to this Act as are or may be fixed for carriers engaged in other methods of transportation."

"§ 2739j-62. Necessity for regulation of contract carriers declared.—It is hereby declared that the business of contract carriers is affected with the public interest, and that the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of common carriers require the regulation of contract carriers to the extent hereinafter provided."

"§ 2739j-63. Contract carriers to obtain permits.—No contract carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a permit from the Commission."

"§ 2739j-64. Application for permit, hearing.—Applications for permits shall be made in the manner and form provided for in the Commission's regulations and said Commission may, if it deems it advisable, require a public hearing to be held thereon, and in this event it shall give written notice thereof to all persons who may, in the opinion of said Commission, be interested in or affected by the issuance of such permit at least ten days prior to the time fixed for such hearing."

"§ 2739j-65. Issuing permit.—Upon the payment of fees hereinafter prescribed, the Commission shall have power to issue to the applicant a permit, in the form to be prescribed by said Commission, authorizing the operation for which application is made, provided the applicant has established to the satisfaction of said Commission that the privilege sought will not endanger the safety of the public or interfere with the public's use of the highways or impair the condition or maintenance of such highways."

"§ 2739j-94. Exemptions from act.—There shall be exempted from the provisions of this Act: . . . Two.



Motor vehicles for hire operating exclusively within the limits of a city or incorporated town, or within ten miles of its limits, Provided, however, that the operator of any such motor vehicle for the carriage of passengers, operating between any city or incorporated town and a point or points within ten (10) miles of the limits thereof, and over regular routes or between fixed termini, may apply to the commission for a Certificate. \* \* \*

"§ 2739j-95. Act to apply to interstate commerce.—This Act and every part thereof shall apply and be construed to apply to interstate commerce, except insofar as the same may be in conflict with the provisions of the Constitution of the United States and the Acts of Congress."

(192)







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**CHARLES ELMORE GORDON**  
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IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1938.**

No. **595**

**8**

**ZIFFRIN, INCORPORATED,**

**Appellant,**

*versus*

**JAMES W. MARTIN, Commissioner of Revenue of the  
Commonwealth of Kentucky, Et Al.,**

**Appellees.**

**APPELLANT'S BRIEF UPON APPELLEES' MOTION  
OPPOSING APPELLANT'S JURISDICTIONAL  
STATEMENT.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1933.

No. \_\_\_\_\_

ZIFFRIN, INCORPORATED, - - - - - *Appellant,*

v. 

JAMES W. MARTIN, COMMISSIONER OF REVE-  
NUE OF THE COMMONWEALTH OF KEN-  
TUCKY, ET AL., - - - - - *Appellees.*

**APPELLANT'S BRIEF UPON APPELLEES' MOTION  
OPPOSING APPELLANT'S JURISDICTIONAL  
STATEMENT.**

**I.**

**REFERENCE TO OFFICIAL REPORT OF  
OPINION BELOW.**

The Opinion of the specially constituted statutory Three-Judge Court, sitting as the United States District Court for the Eastern District of Kentucky, delivered below, and being the only opinion delivered by the Court below, is officially reported under the style, *Ziffrin, Inc. v. Martin, Et Al.*,<sup>7</sup> in 24 Fed. Supp. 924.



## II.

## STATEMENT OF THE CASE.

January 25, 1939, the appeal herein was allowed and citation issued. On February 8, 1939, appellees served appellant with a typewritten statement contemplated by *Paragraph 3 of Rule 12* of the Rules of this Court, setting forth matter asserted by appellees to constitute matter and grounds making against the jurisdiction of this Court. The record on appeal has not yet been printed by the Clerk. This brief is tendered and filed conformably with *Paragraph 3 of Rule 7* of the Rules of this Court. The printed record not being available, and there being no prospect that it will be available within the 20 days allowed for the filing of this brief, it is impossible to furnish herein page references to the record. Most of the facts pertinent to the question presented by appellees' pending motion are stated in the Jurisdictional Statement, which we presume will have been printed before the Court addresses itself to a determination of appellees' pending motion. However, there are a few facts presented by the record, but not mentioned in the Jurisdictional Statement, which are relevant to the present inquiry. These we shall mention as the discussion progresses.

The facts stated in the Jurisdictional Statement and admitted upon the face of the pleadings, show that at all times since January 1, 1935, appellant has been, and is, an Indiana corporation and an interstate con-



*tract carrier of property by motor vehicle for hire; that appellant's operations, involved upon this appeal, have consisted solely and exclusively in transporting consignments of alcoholic liquors, sold by distillers and other vendors having their places of residence and business in Jefferson County, Kentucky, to purchasers domiciled and having their places of business in Indianapolis, Indiana, Chicago, Illinois, and at other places situated north of the Ohio River and in States other than Kentucky, and which cargoes have been, and are, transported and delivered by appellant to said purchasers pursuant to special contracts of carriage existing between appellant and the vendors and consignors, and by continuous and uninterrupted transit from point of origin to destination; and that such of appellant's operations as have penetrated the territorial limits and confines of Kentucky consisted, and consist, exclusively in the carriage of interstate exports of alcoholic liquors from and out of Kentucky to other States.*



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## III.

## ARGUMENT.

**(a) No Stay of State Court Proceedings Is Involved.**

Appellees urge two principal grounds in opposition to this Court entertaining jurisdiction of the appeal. The first ground is founded upon the provisions of *Judicial Code, Sec. 265*, U. S. C., Title 28, Sec. 379. These provisions of the Judicial Code are entirely inapplicable because they pertain to *stay of pending* proceedings in a state Court, and appellant does not seek in this cause to stay any pending proceeding whatever in any state Court. In fact, no state Court proceeding ever has been instituted between the parties to this record, and there never has been any state Court proceeding to stay. What appellant seeks in this suit is to prevent enforcement against it of the terms and provisions of the Kentucky 1938 "*Alcoholic Beverage Control Law*" (Ky. Stats., Sec. 254b-97, *et seq.*), including, among other things, prevention, it is true, of the institution and commencement of a multiplicity of threatened criminal and confiscatory proceedings and prosecutions against appellant, its officers and employees, and consigned cargoes of liquors. Manifestly, however, the prevention of the institution and commencement of such *threatened* proceedings is an entirely different matter from the stay of the *pending* proceedings contemplated by the cited section of the Judicial Code. In numerous cases, cited later in this brief, injunctive



prevention of enforcement of unconstitutional state statutes has been sanctioned and granted, and the action of the Federal Courts in granting such relief never has been deemed in contravention of the cited section, or any other section, of the Judicial Code.

**(b) Appellant Has No Adequate Remedy at Law.**

*The second ground* which appellees assert should induce this Court to decline to entertain jurisdiction is that appellant should be denied equitable relief because the Kentucky Statutes, Sec. 2554b-147 and Sec. 2739j-86, *et seq.*, show appellant to have had adequate and complete remedies at law for the review of (a) the decision of the Director of the Division of Motor Transportation, denying appellant a common carrier's certificate, and (b) the decision of the Commissioner of Revenue and the Alcoholic Beverage Control Board of Kentucky, denying appellant a liquor Transporter's License. It is true that the Kentucky Statutes provide for appeals from decisions and rulings of the character in question. However, as will be shown, *prosecution of such appeals by appellant would have been futile, in that they would not have prevented the destruction of its established, profitable and valuable business.*

As shown by the pending motion and by the Jurisdictional Statement, (a) the pretended Alcoholic Beverage Control Law of Kentucky (hereinafter called "Control Law") the validity of which is drawn in question, specifies that the only kind of carrier by



motor vehicles eligible to obtain the liquor Transporter's License is a motor carrier holding a common carrier's certificate from the Division of Motor Transportation, and (b) the Division of Motor Transportation is not permitted to issue a common carrier's certificate (which is a *certificate of public convenience and necessity*), to any carrier unless it be engaged in the business of *common carriage*. The consequence is that under the Kentucky Statutes the Director of the Division of Motor Transportation, in denying appellant's application for a common carrier's certificate, cannot be said to have acted without or in excess of his powers, and his decision cannot be said to have been otherwise than in conformity with the Kentucky Act governing such matters. The Director's finding of facts was fully supported by substantial evidence, because upon the hearing before him appellant frankly stated that it was a *contract* carrier and not a *common* carrier. There is no claim or pretense that the Director's decision was procured by fraud. Such being the facts and such being the only grounds provided by the Kentucky Motor Transportation Act for an appeal from a decision by the Director, appellant had not a single ground of appeal, and prosecution of an appeal would have been nothing short of frivolous. Similarly, no fraud was involved in the action of the Commissioner of Revenue and the Alcoholic Beverage Control Board in denying appellant's application for a liquor Transporter's License, and there was ample evidence before them that appellant did not hold a common carrier's



certificate, and consequently, under the provisions of the Control Law, was ineligible to receive the Transporter's License. The Commissioner and the Control Board strictly obeyed the Control Law, as written, and did not act without or in excess of their powers in denying appellant a liquor Transporter's License, *except insofar as their action in so doing represented enforcement of a Kentucky Statute void because in conflict with the Constitution and laws of the United States.*

It is true that it was open to appellant to appeal to the Franklin Circuit Court, and thence—if need be—to the Court of Appeals of Kentucky, asserting the same constitutional objections to the Control Law that are asserted in this case. The Control Law in question confers the right to prosecute such appeals and by its own terms establishes the appellate procedure, but it does not provide for, *permit, or admit of, an injunction pending the appeal.* (See Sec. 49, pp. 19-21, hereof.) The result is that during the pendency of such appeal, had the same been prosecuted, appellant would have been unable to transact its business and necessarily would have lost its special contracts of carriage. The distillers and other shippers certainly would not have deferred making shipments until Ziffrin, Inc., had prosecuted its appeals through the Franklin Circuit Court and the Court of Appeals of Kentucky, to say nothing of having waited until the matter finally might have been determined upon ultimate review by the Supreme Court of the United States. Consequently, in application to appellant and its business,



the remedy of appeal provided by the Kentucky Statutes was, and is, a remedy utterly inadequate to protect appellant's business and investment from imminent destruction.

Appellees' contention that appellant has an adequate remedy at law is untenable. The record shows that since July 1, 1938, appellees have threatened to enforce, and unless enjoined by the Court will attempt to enforce, the Control Law's penal, criminal and confiscatory provisions against appellant, its officers, automotive equipment and against its interstate shipments and consignments of whiskies. For a *first offense*, consisting in transporting intoxicating liquors without holding a Transporter's License, the Control Law, Sec. 94, Ky. Stats., Sec. 2554b-195, prescribes a fine of not less than \$100.00 and not more than \$5,000.00 and imprisonment not to exceed 5 years, or both; for *second and subsequent offenses*, a fine or not less than \$500.00 and not more than \$10,000.00, or imprisonment for a term not exceeding 10 years, or both, which penalties may be inflicted not only upon the corporation, but also upon its officers and employees. Whiskies in possession of an unlicensed carrier, and motor vehicles carrying the same, are declared contraband, subject to confiscation (Control Law, Sec. 53; Ky. Stats., Sec. 2554b-151).

The record shows that continuation of such threats of enforcement will destroy appellant's business and its capital investment therein, and will result in immediate, inevitable and irreparable loss, and that un-



less restrained by the Court, appellees intend, threaten to, and will cause numerous vexatious criminal proceedings to be commenced and prosecuted against appellant, its officers, equipment and cargoes, which prosecutions will be in excess of 10 in number.

Under the *Control Law, Sec. 89, Ky. Stats., Sec. 2554b-190*, distillers are forbidden to transport by an unlicensed carrier *under penalty of revocation of their distiller's licenses*. Distillers will not take that risk. Neither appellant nor appellant's customers can await a long deferred decision by state Courts. The shipments must go forward, and if appellant is not in a position to transport such consignments then, obviously, the distillers with whom appellant has contracts, and appellant's other customers, will make other arrangements, and by the time the constitutional questions would be decided by resort to the appellate procedure prescribed by the Control Law, appellant's contracts would be lost and its business destroyed, even though after weary years of litigation the Kentucky Courts ultimately should hold the Control Law to be unconstitutional.

*Boise Artesian, Etc., Water Co. v. Boise City*, 213 U. S. 276, 53 L. Ed. 796, and *Matthews v. Rodgers*, 284 U. S. 521, 76 L. Ed. 447, cited and quoted in the pending motion, representing efforts to restrain the collection of a municipal and state privilege tax respectively, are clearly distinguishable, in that in both cases only the matter of the payment of a mere tax was involved, and the suitors had available to them complete



and adequate remedies at law. In the case at bar the matter is not one of mere collection of a tax,—appellant paid the fees and taxes for both the common carrier's certificate and Transporter's License, as the record shows without contradiction. The question upon this appeal is not whether appellant temporarily is to be *out of pocket* for tax payments; the question is *whether appellant is to be completely and permanently out of business*. It would profit appellant nothing ultimately to win its case via the route of the statutory appellate procedure suggested by appellees, if appellant loses its entire business and capital investment, *pendente lite*, as it surely would absent the protection of an interlocutory injunction, not obtainable in such state appellate proceedings. Such a winning of the case would prove a Pyrrhic victory, indeed.

In the above cited cases, relied upon by appellees, nothing more was involved than contentions of unconstitutionality of an ordinance and a statute. In the case at bar, not only the unconstitutionality of the Control Law is presented, but facts exist (fully pleaded in the bill of complaint as amended and confessed by the motion to dismiss the bill) bringing the case under recognized heads of equity jurisdiction, showing appellant to be possessed of no adequate remedy at law and to be entitled to injunctive relief.

A situation analogous to that involved upon this appeal frequently has been presented in cases involving the rates of public utilities, prescribed by public authority, in which cases it unsuccessfully has



been contended that the affected utilities could not obtain injunctive relief in the Federal courts based upon the ground that the State action complained of violated the utilities' constitutional rights because available to them were alternate remedies at law in the State courts or before State Commissions. Time after time this Court has held that the existence of such optional legal remedies did not oust the Federal courts of jurisdiction where the facts showed such legal remedies to be inadequate or incomplete (*Hollis v. Kutz*, 255 U. S. 452, 65 L. Ed. 727; *Pendergast v. New York Tel. Co.*, 262 U. S. 43, 67 L. Ed. 853; *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 69 L. Ed. 1020.)

Manifestly, there is an intimate association and relation between enforcement of the Control Law's criminal provisions and the appellant's property right in its established interstate business. The inadequacy of the remedy at law proffered appellant in the State courts of Kentucky is patent when the situation is viewed in the light of the Control Laws' criminal provisions. It is unnecessary to elaborate upon the obvious fact that appellant's officers will not take the risks incident to violating the Control Law's penal provisions, of severity almost without parallel or precedent. For reasons best known to it, the General Assembly of Kentucky provided penalties for transporting a shipment of liquor without holding a Transporter's License—an act only *malum prohibitum*—far more severe than those which it has prescribed for mayhem, involuntary manslaughter, abducting a girl child, or shooting from ambush, or illicit sale of marihuana (Ky.



Stats., Secs. 1165, 1151, 1156, 1224, 2635a-1). For those esoteric reasons the General Assembly did not content itself with putting teeth in the Control Law, but implemented it with veritable fangs. Those penalties effectively dissuaded appellant and its responsible officers from undertaking the brash venture of testing the validity of the Control Law by violating its terms and inviting and procuring criminal prosecution. *Prevention of such prosecutions was and is essential to safeguard appellant's rights in its property.* Decisions, in a long, unbroken line, hold that *equitable jurisdiction exists to restrain criminal prosecutions threatened under unconstitutional statutes when the prevention of such prosecutions is essential to safeguard rights of property.* *Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131; *Adams v. Tanner*, 244 U. S. 590, 61 L. Ed. 1336; *Kennington v. Palmer*, 255 U. S. 100, 65 L. Ed. 528; *Terrace v. Thompson*, 263 U. S. 197, 68 L. Ed. 255; *Packard v. Banton*, 264 U. S. 140, 68 L. Ed. 596; *Hy-Grade Provision Co. v. Sherman*, 266 U. S. 497, 69 L. Ed. 402. A comparatively recent case,

*Tyson & Bro. v. Banton*,  
271 U. S. 418, 71 L. Ed. 718,

is typical. The appellant was engaged in New York City in the business of reselling theatre tickets which it obtained from theatre box offices, or from brokers, and which it resold at an advanced price. The New York statute prohibited the resale of any such ticket at a price in excess of fifty cents greater than the price printed on the face of the ticket. For a violation of



these provisions the New York statute provided a \$250.00 fine or imprisonment for one year, or both—which penalties, it will be observed, were not ten per cent so severe as those assumed to be provided by the Kentucky Control Law. Tyson & Bro. instituted suit to enjoin the respondent from enforcing the statute, and from threatening to institute criminal prosecutions against the appellant, its officers and agents. This Court said:

“Following the rule frequently announced by this Court, that ‘*equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights or property,*’ we sustain the jurisdiction of the district court.” (Italics ours.)

In the cited case, without an injunction Tyson could have continued its business and would have suffered but a diminution in profits; in the case at bar, Ziffrin—absent an injunction—would be out of business.

In a number of cases in which motor carriers have sought to prevent the enforcement against them of unconstitutional State statutes, and the penal and criminal provisions thereof, this Court uniformly has applied the rule of the cases above cited. The pertinent motor carrier cases are: *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *Bush & Sons Co. v. Maloy*, 267 U. S. 317, 69 L. Ed. 627, and *Allen v. Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.



In enjoining prosecutions threatened under the unconstitutional statutory enactments presented in the cases cited, the Court awarded injunctive relief, although remedies existed at law, because the remedies at law were inadequate. The Court's action in enjoining enforcement of those statutes and its action in enjoining criminal prosecutions thereunder, show that the granting of such injunctions in no way violates the provisions of *Section 265* of the *Judicial Code*.

It is essential in the case at bar in order to safeguard appellant's property rights in its business and in its contracts, and in order to protect appellant, its officers and employees, from a multiplicity of baseless criminal prosecutions, that the threatened criminal prosecutions be enjoined. Against the injuries so threatened neither the State statutory appellate procedure—which appellees would foist upon appellant—nor any other remedy at law, would prove effective. Only the injunctive process affords this appellant an effective remedy and an adequate safeguard for its constitutional right to continue to engage in its established *interstate export business*, and so to do in its character of *interstate contract carrier*.

**(c) The Twenty-first Amendment and the Webb-Kenyon Act Are Irrelevant.**

The concluding paragraph of the pending motion asserts that the States have been invested with exclusive control of alcoholic liquors by virtue of the provisions of the *Twenty-first Amendment* to the Constitu-



tion and by the *Webb-Kenyon Act*. It suffices to say that the Amendment and statute referred to pertain to *importations* of liquors into a State in contravention of its laws, but that neither amendment nor statute undertakes to give a State any power, authority or control whatsoever with respect to the transportation of alcoholic liquors in *export—from and out of such State in interstate commerce*. The most casual reading of the Webb-Kenyon Act and the Twenty-first Amendment shows that their terms are as foreign to the question of *interstate exportation* of intoxicants presented upon this appeal, as are the terms and provisions of the Uniform Negotiable Instruments Act.

**(d) Intrastate Commerce Is Not Involved.**

The concluding paragraph of the pending motion asserts that it is appellees' contention that the commerce presented in the case at bar is *intrastate* commerce. If ever transactions of interstate commerce have been described in a pleading or record, *interstate* commerce unequivocally has been described, characterized and alleged in the complaint as amended and in the Jurisdictional Statement herein. We are as disinclined to allow our allegations of interstate commerce to be converted into allegations of intrastate commerce as Ziffrin, Inc., is loth—despite the duress and attempted compulsion of the Control Law—to suffer its contract carrier's business to be converted into a common carrier's business.



(e) Comity Is Not Involved.

The concluding thought of the last paragraph of the pending motion is that the matters drawn in question upon this appeal properly should have been litigated before the State courts of Kentucky upon statutory appeals from the aforementioned decisions denying appellant's applications for common carrier's certificate and Transporter's License. The record shows: the amount in controversy to exceed \$3,000.00, exclusive of interests and costs; the appellant to be a resident of Indiana and the appellees to be citizens and residents of Kentucky; and that the suit is one arising under the Constitution and laws of the United States. Both by reason of diversity of citizenship and presence of a Federal question appellant was entitled to select the United States District Court as the forum in which it would litigate with the appellees the question of the validity of the Control Law with respect to appellant's operations of transporting intoxicating liquors *exclusively in export from Kentucky and exclusively in interstate commerce*. Appellees would avoid, if they could, this Court's arbitrament of the issue, and motivated by that desire have injected a spurious issue of comity. The record presents no question of comity. The only suit between these parties is the case at bar; there is not, and there never has been, a suit between these parties in a State Court. There is not, and there cannot be, a question of conflicting jurisdiction between State and Federal courts. It is elementary, that as between courts of concurrent jurisdiction, the plaintiff is entitled to select his forum. Appellant, in the



exercise of that legally conferred option, selected the United States District Court for the Eastern District of Kentucky.

Upon the record presented, and well within the bounds of the principles enunciated so forcibly in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, this Court has disclaimed discretion to say that appellant quixotically should have prosecuted futile appeals through the state Courts and no question of comity is involved because, "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied," and "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction \* \* \*."

### CONCLUSION.

For the reasons and upon the grounds presented in the Jurisdictional Statement and in this brief, it would appear that this Court well may entertain jurisdiction of this appeal, that appellees' motion should be overruled, and that probable jurisdiction should be noted.

Respectfully submitted,

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# APPENDIX.

## KENTUCKY STATUTES.

### 1. Alcoholic Beverage Control Law.

*Sec. 18, Ky. Stats., Sec. 2554b-114, sub-para. 7.*

"(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum."

*Sec. 49, Ky. Stats., Sec. 2554b-147.*

"Judicial review of order of board; parties and procedure; costs.—Any order of the Alcoholic Beverage Board refusing a license or revoking or suspending a license may be appealed from by the applicant or licensee, as the case may be, and any order of said Board granting a license or refusing to revoke or suspend a license may be appealed from by any citizen feeling himself aggrieved. The party aggrieved may, within ten days after the entry of the order with which he is dissatisfied, file in the office of the Clerk of the Franklin Circuit Court an attested copy of the order, of all the evidence heard, and of all the steps taken by the said Board relative to the order being contested, provided he shall first post a bond to secure the costs of that action in such sum as may be approved by the Circuit Court, with a corporate surety approved by the Division of Insurance of the Department of Business Regulation as to solvency and responsibility and authorized to transact business in this Commonwealth. The State Board and the licensee or applicant shall be necessary parties to all such appeals. The Circuit Court Clerk shall thereupon docket the case as though it were a petition in equity, and shall immediately issue a summons for said State Board, if the appeal be taken by an applicant or licensee, or a summons for said State Board and the licensee if the appeal be prosecuted."



by a citizen. Such summons shall be returnable in the same manner as are summonses in equity cases. If the appeal be from an order refusing to grant a license or revoking or suspending a license, it shall be the duty of the State Board, when served with such summons, or of such person as it may designate, to appear and defend the action of the State Alcoholic Beverage Board in refusing to grant or in revoking the license in question. If the appeal be from an order granting a license or refusing to revoke or suspend a license the burden of appearing and defending the action of said Board shall be upon the licensee.

"No formal pleading shall be required in such appeals, but the case shall be set down by the court for as early a day as possible for a hearing, and such appeals shall in all respects to be expedited as are declaratory judgment suits; after such hearing the court shall enter a judgment sustaining or setting aside the order of the State Alcoholic Beverage Control Board appealed from. No new or additional evidence may be introduced in the Circuit Court except as to the fraud or misconduct of some party engaged in the administration of this Act and affecting the order appealed from, but the Circuit Court shall otherwise hear the case upon the record as attested by the Board, and shall in all respects dispose of the appeal in a summary manner, its review being limited to determining whether or not:

"(1) The Board acted without or in excess of its powers.

"(2) The order appealed from was procured by fraud.

"(3) If questions of fact are in issue, whether or not any substantial evidence supports the order appealed from.

"Any party aggrieved by a judgment of the Circuit Court may appeal to the Court of Appeals in the same manner that appeals are taken under the declaratory judgment act.

"If the appeal be from an order refusing to grant a license, or revoking or suspending a license, the costs shall be taxed against the applicant or licensee in any event. If



the appeal be from an order granting a license or refusing to revoke or suspend a license, the costs shall be taxed against the citizen who, feeling himself aggrieved, has contested the order, in the event that the order of the Board granting the license or refusing to revoke or suspend the license, is sustained. In the event that such order is set aside with direction to the Board to refuse the license or to revoke or suspend the license, the costs shall be taxed against the licensee.

"No order granting a license shall become effective, and no license thereunder shall be issued, until the expiration of ten days after the date of the entry of such order; and if, within said period of ten days, an appeal from said order shall have been filed as provided by this section, then such order shall not become effective until said appeal shall have been finally determined.

"If a license shall be revoked or suspended by an order of the Board, the licensee shall at once suspend all business or other operations authorized under his license, except as provided in section 46 of this Act, though he may file an appeal in the Circuit Court from the order of revocation or suspension, and no court shall have authority to issue an injunction to suspend the operation of an order of revocation or suspension pending an appeal. If upon appeal to the Circuit Court an order of suspension or revocation is upheld, or if an order refusing to suspend or revoke a license is reversed, and an appeal is taken to the Court of Appeals, no court shall have authority to issue an injunction to suspend the operation of the judgment of the Circuit Court pending the appeal."

*Sec. 52, Ky. Stats., Sec. 2554b-150.*

"No traffic in alcoholic beverages save under license.— It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this



Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport, or otherwise traffic in alcoholic beverages without first having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said persons will be required to pay said license for the full year notwithstanding that no license shall be issued, together with a penalty equal to twenty (20) per cent of said license tax."

*Sec. 53, Ky. Stats., Sec. 2554b-151.*

"Declaring certain property contraband: Providing for its disposition.—The following property is hereby declared to be contraband: (1) Any illicit still designed for the unlawful manufacture of intoxicating liquors, or any apparatus designed for the unlawful manufacture of spirituous, vinous, malt of intoxicating liquors. An illicit still or apparatus designed for the unlawful manufacture of intoxicating liquors shall include (a) An outfit or parts of an outfit commonly used, or intended to be used, in the distillation or manufacture of spirituous, vinous or malt liquors which is not duly registered in the office of a collector of Internal Revenue for the United States, and the burden of proving that same is so registered shall be on the defendant or defendants under charge; (b) any and all material, equipment, implements, devices, firearms, and other property used or intended for use, directly and immediately, in connection with the illicit traffic in alcoholic beverages. (2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act. (3) Any spirituous, vinous or malt liquors in the possession of any one and to which the revenue stamps have not been affixed as and when required by the provisions of the Alcoholic Beverage Tax Act, Sections 4281c-1 to and including 4281c-25, Car-



roll's Kentucky Statutes, one thousand nine hundred thirty-six (1936) edition. (4) Any distilled spirits, wine or malt beverage in a container of a size prohibited by law or prohibited the particular party in whose possession same is found. (5) Any distilled spirits or wine kept in an unauthorized place within any licensed premises under the provisions of section 77 of this Act. (6) Any motor vehicle, water or air craft, or other vehicle in which, any person is illegally possessing or transporting alcoholic beverages.

"Any peace officers, including the Administrators, and the field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Beverage Control Board, subject to the right of any owner or lienor of property in subsection six above, whose lien is of record, to intervene and establish his rights in such property by providing that the property was being used in connection with traffic in alcoholic beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being bona fide shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as



contraband in connection with the arrest of defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board.

*Sec. 54, Ky. Stats., Sec. 2554b-154, sub-para. 7.*

"(7) A Transporter's License as provided for in Section 18(7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

*Sec. 89, Ky. Stats., Sec. 2554b-190.*

"Transportation by non-licensee prohibited; exception.—No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such Beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."

*Sec. 94, Ky. Stats., Sec. 2554b-195.*

"Penalties for trafficking in alcoholic beverages without a license.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction, shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than



\$500.00 and not to exceed \$10,000.00, or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

## 2. Motor Vehicle Transportation Act.

Ky. Stats., *Sec. 2739j-86.*

"Appeal from decision of commission, petition, summons to issue.—When any application for a certificate or permit has been refused, the applicant shall have the right to appeal, or if the application is granted, any person who has filed a protest to the granting of such application shall have the right to appeal as hereinafter provided. The appellant may, within twenty (20) days after the rendition of the order of the Commission, file a petition of appeal with the Clerk of the Circuit Court of Franklin County. Such petition shall state completely the grounds upon which the review is sought, shall assign all errors relied on, and shall be accompanied by a copy of the record, certified by said Commission, or an abstract thereof if agreed to by all parties to the hearing before said Commission. The appellant shall furnish copies of the petition to each person who was a party to the hearing before said Commission. Summons shall be issued upon the petition, directing the adverse party or parties to file answer within fifteen (15) days after service thereof."

*Sec. 2739j-87.*

"Review by circuit court.—No new or additional evidence may be introduced in the Circuit Court except as to fraud or misconduct of some person engaged in the administration of this Act and affecting the order, ruling or award, but the court shall otherwise hear the case upon the certified record or abstract thereof, and shall dispose



of the case in summary manner, its review being limited to determining whether or not: One. The Commission acted without or in excess of its power; Two. The order, decision or award was procured by fraud; Three. The order, decision or award is in conformity to the provisions of this Act; Four. The finding of facts in issue is supported by any substantial evidence."

*Sec. 2739j-88.*

"Review proceedings, parties, judgment, remanding case; appeal to court of appeals.—The Commission and each party shall have the right to appeal in such review proceedings. The Court shall enter judgment, confirming, modifying or setting aside the order, decision or award, or, in its discretion, remanding the case to the Commission for proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing of facts, remand the cause to said Commission. Any party may appeal from the decision of the Circuit Court to the Court of Appeals. Such appeals to the Court of Appeals shall have precedence of other cases pending."

### **ACTS OF CONGRESS.**

#### **3. Judicial Code, Sec. 265, U. S. C. A., Title 28, Sec. 379.**

"Same; stay in State courts.—The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy (R. S., Sec. 720; Mar. 3, 1911, c. 231, Sec. 265, 36 Stat. 1162).

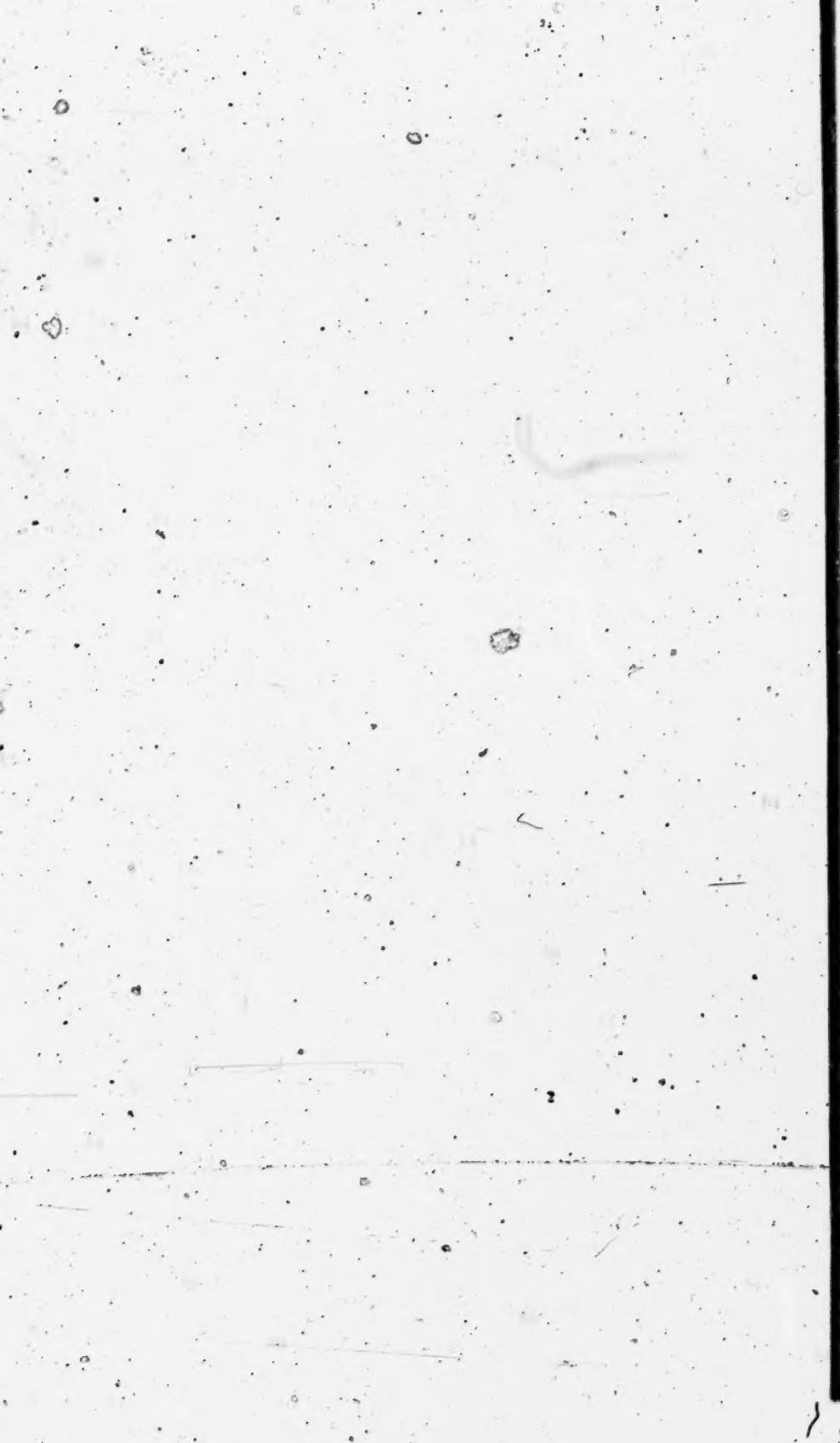


#### 4. Webb-Kenyon Act,

Being Act of Cong., March 1, 1913, c. 90, 37 Stat. 699; Act of Cong., August 27, 1935, c. 740, Sec. 202(b), 49 Stat. 877, U. S. C. A., Title 27, Sec. 122.

“Shipments into states having dry laws; prohibition.—The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited.”







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CHARLES ELMORE GARDNER

CLERK

# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIFFRIN, Incorporated,

Appellant,

*versus*

JAMES W. MARTIN, Commissioner of Revenue of the  
Commonwealth of Kentucky, Et Al.,

Appellees.

## BRIEF FOR APPELLANT.

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*Of Counsel.*







# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIFFRIN, INCORPORATED,

*Appellant,*

*v.*

JAMES W. MARTIN, ET AL.,

*Appellees.*

## ERRATA SHEET TO BRIEF FOR APPELLANT.

page iii, lines 3 and 4; in line 3, delete comma following word "thereon"; in line 4, substitute word "injunctive" in lieu of word "injunction," so that lines will read:

"relying and acting thereon in denying appellant the injunctive relief prayed.....90-107."

page v, line 15, following abbreviation "U. S. C." interpolate "Title 28, Secs." so that line will read:

"Judicial Code, Secs. 238, 266, U. S. C., Title 28, Secs. 345, 380.....2; 14."

page vii, line 3, complete citation, so that line will read:

"*Clark v. Paul Gray, Inc.*, 306 U. S. 583, (dec)"

page vii, line 8, complete citation, so that line will read:

"*Clason v. Indiana*, 306 U. S. 439, (decided)"



page viii, lines 1 and 2, complete citation, so that lines will read:.

“*Eichholz v. Public Service Comm.*, 306 U. S. 268 (decided Feb. 27, 1939) .....24.”

page viii, line 14, complete citation, so that line will read:

“*Gibbs v. Buck*, 307 U. S. 66, (decided Apr. 17,”

page 2, line 3 of first paragraph, following abbreviation,

“U. S. C.” interpolate “Title 28” so that line will read:

“*cial Code §§238 and 266, U. S. C., Title 28, §§345 and 380 re-*”

page 24, lines 23 and 24, complete citation to *Eichholz v.*

*Public Service Comm.*, by supplying,

“306 U. S. 268”

page 25, line 14, complete citation to *Clason v. Indiana*, by

supplying, “306 U. S. 439”

page 29, lines 19 and 20, complete citation to *Clark v. Paul*

*Gray, Inc.*, by supplying,

“306 U. S. 583”

page 118, lines 31 and 32, complete citation to *Gibbs v.*

*Buck*, by supplying,

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# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

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ZIFFRIN, INCORPORATED, - - - - - *Appellant,*

v.

JAMES W. MARTIN, COMMISSIONER OF  
REVENUE OF THE COMMONWEALTH OF  
KENTUCKY, ET AL., - - - - - *Appellees.*

---

## BRIEF FOR APPELLANT.

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### I.

#### REFERENCE TO OFFICIAL REPORT OF OPINION BELOW.

The opinion of the specially constituted Statutory Three-Judge Court, sitting as the United States District Court for the Eastern District of Kentucky, delivered below, and being the only opinion delivered by the Court below, is officially reported, under the style, "*Ziffrin, Inc., v. Martin, Et Al.,*" in 24 Fed. Supp. 924.



## II.

**GROUND'S UPON WHICH JURISDICTION OF SUPREME COURT OF THE UNITED STATES IS INVOKED.**

Stated in general terms of ultimate legal effect, the jurisdiction of this Court is invoked under *Judicial Code*, §§238 and 266, *U. S. C.*, §§345 and 380, respectively, on the ground that this is a direct appeal from the final judgment and decree of a Statutory Three-Judge Court, sitting as the District Court of the United States for the Eastern District of Kentucky (R. 65, 71), denying appellant—after notice and hearing (R. 32, 64, 65, 66)—both an interlocutory and a permanent injunction (R. 67, 68) suspending and restraining the enforcement, operation and execution of a certain Kentucky statute known as the "Alcoholic Beverage Control Law," hereinafter identified, by restraining the action of public officers of Kentucky in the enforcement and execution of the statute.

The cause's concrete facts substantiating the foregoing general statement and showing this Court's jurisdiction to attach as mentioned, have been set forth at length in appellant's Jurisdictional Statement heretofore filed in the District Court below and heretofore printed by the Clerk of this Court, and an expanded detailed statement of those same concrete facts is set forth, of necessity, in the "Statement of the Case" appearing as the next numbered section of this brief. No useful purpose would be served by a repetition of



the particularized statement of the jurisdictional facts and, in the interests of brevity, we beg leave to omit restating them in this section of the brief, to invite the Court's attention to the immediately succeeding section hereof, and to ask that it be read and considered as a part of our statement of the grounds upon which the Court's jurisdiction is invoked.

### III.

#### STATEMENT OF THE CASE.

The appellant, Ziffrin, Incorporated, plaintiff below (and hereinafter sometimes so denominated)—an Indiana corporation (R. 1, 2) and an authorized interstate contract carrier of property by motor vehicle, engaged in carrying exports of whiskey exclusively from Kentucky in interstate commerce—seeks in this action to restrain and enjoin the appellees, defendants below (and hereinafter sometimes so denominated) from enforcing, and from attempting or threatening to enforce, against the plaintiff, its officers, employees, automotive equipment and consigned cargoes of liquor, the contraband and penal provisions of the pretended 1938 Alcoholic Beverage Control Law of Kentucky (hereinafter sometimes called merely "*Control Law*") (R. 3-10; 39-43; 62, 63; 24, 25; 44-46). Plaintiff charges that the Control Law contravenes the Commerce Clause of the Constitution, *Art. 1, Sec. 8, Cl. 3*, and the *Due Process* and *Equal Protection Clauses* of the *Fourteenth Amendment* (R. 22, 23, 25, 26) because,



under pain of extravagant penalties (R. 14-16, 63), the Control Law prohibits plaintiff from carrying *exports* of intoxicating liquors from Kentucky in interstate commerce merely because plaintiff is a "*contract*" instead of a "*common*" carrier of freight by motor vehicle for hire (R. 15, 18, 19, 25, 26). No evidence was offered by defendants in opposition to the application for a preliminary injunction or in support of their motion to dissolve the temporary restraining order. The Court below held, as a matter of law, that the Control Law is constitutional, and by its final decree denied plaintiff the injunctive relief sought and dismissed the complaint (R. 48-62; 65, 67, 68). From the order and final decree denying it interlocutory and permanent injunctive relief, plaintiff prosecutes this appeal (R. 71, 73, 77, 78).

The complaint as amended alleges and presents, and defendants' motion to dismiss the bill confesses, the following facts:

*Continuously since March 20, 1933*, and at all of the times involved, the plaintiff, Ziffirin, Incorporated, has been, and is an Indiana corporation, domiciled at Indianapolis, Indiana, authorized by its charter to engage, and actually engaged, in the business of an *inter-state contract carrier* of freight by motor vehicle for hire (R. 1, 2). Defendants are the Commissioner of Revenue of Kentucky, the Attorney General of Kentucky, the members of the Alcoholic Beverage Control Board, created by the aforementioned Control Law, the Assistant Attorney General assigned to said Con-



trol Board, and one of said Board's Field Representatives, all officers and citizens of Kentucky, and all charged by law with the duty of enforcing said Control Law (R. 2-4; 11-13; 23, 39). On July 1, 1935, and prior thereto, plaintiff was, and continuously since has been, in *bona fide* operation as a contract carrier of freight by motor vehicle for hire between Louisville, Ky., and Chicago, Ill., via Indianapolis, Ind., and elsewhere, conducting operations in interstate commerce along and over Federal Aid Highways, U. S. Nos. 31, 52 and 41, which routes have been, and are, the direct, usual and convenient, and only commercially practical and feasible routes for motor carriers of freight from Louisville, Ky., to Chicago, Ill., via Indianapolis, Ind. (R. 3, 6, 7, 41, 42). On September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which such interstate contract motor carriers might file applications for operating permits (R. 7). On February 4, 1936, plaintiff filed application with the Interstate Commerce Commission for a permit to operate as an interstate contract motor carrier of freight for the aforementioned territory and routes, which application since has continued, and now continues, pending and undetermined before the Interstate Commerce Commission (R. 7, 42), with the consequence that under the express and explicit provisions of *Federal "Motor Carrier Act, 1935"* (U. S. C. A., Title 49, Sec. 309, Appendix hereto, 22, 31, 32), continuance of plaintiff's operations has been, and is, lawful (R. 7, 8).



In October and November, 1936, plaintiff entered into written contracts with Schenley Products Co. and Jos. E. Seagram & Sons, Inc., and their affiliates, all engaged in the business of whiskey distillers, to transport for hire by motor vehicles, consignments of whiskeys sold by the distillers and to be delivered by them to the plaintiff, in Louisville, Jefferson County, Kentucky, and at points within a distance of ten miles of its corporate limits, intended and consigned by said bailors for immediate transportation and delivery to the consignee-purchasers of said whiskeys at such consignees' respective places of residence and business location in Indianapolis, Ind., Chicago, Ill., and at other places situated north of the Ohio River (R. 4, 5, 62). At all times subsequent to January 1, 1935, the plaintiff has had, and now has, transportation contracts with other customers, whose residences and places of business are located in Indianapolis and in Chicago, and in other places situated in the States of Indiana and Illinois and in other States lying north of the Ohio River, which contracts provide that the plaintiff shall carry and transport for those customers consignments of liquors purchased by them from whiskey distillers and other whiskey vendors having their places of business in Louisville, Kentucky, and within a radius of ten miles of its corporate limits. The last mentioned contracts contemplate and provide that plaintiff shall receive the consignments of liquors from the distillers and vendors in Louisville, and within the mentioned ten-mile radius, consigned



by the distillers and vendors thereof for delivery to the consignee-customers at their aforementioned places of residence and business domicile and location (R. 39; 40). At all times subsequent to their execution the aforementioned contracts have continued to be, and are, in full force and effect, and pursuant thereto plaintiff has carried large quantities of whiskies from Louisville, Ky., and immediate vicinity, to Indianapolis, Ind., Chicago, Ill., and other places situated north of the Ohio River (R. 5, 6, 40, 41). All of said consignments of liquors, received for transportation and transported by the plaintiff as aforementioned, were designated and intended by the consignors thereof for immediate, uninterrupted and continuous transport to destination, and were so carried and transported by the plaintiff (R. 5, 41, 63).

On no occasion has plaintiff carried any liquor, or other freight, from any point in Kentucky for delivery to any other place in Kentucky (R. 6).

At all times since the execution of the contracts with Schenley and Seagram, the transportation of whiskey and alcoholic liquors as aforementioned has constituted the principal and major portion of plaintiff's motor transportation business from Louisville to Chicago (R. 9).

All of the plaintiff's activities penetrating into the State of Kentucky in connection with the transportation of intoxicating liquors, have consisted solely and exclusively in carriage and transportation necessarily incidental to sales of such intoxicants sold for delivery



by persons doing business as distillers and vendors in Louisville, and in its immediate vicinity, and so sold by them for delivery to purchasers residing and situated in States lying north of Kentucky, under contracts of sale and delivery requiring the delivery of such merchandise to the purchasers thereof at the latter's aforementioned places of residence, domicile and business location, and have consisted solely and exclusively in carrying such *exports out of Kentucky* (R. 10, 43). The aforementioned Federal Aid Highways have been used and employed by the plaintiff in conducting its aforementioned operations of carrying exports of whiskies (R. 6, 41, 42).

The branch of plaintiff's freight transportation business devoted to the carriage of liquors exclusively in export has been, and is, an established and profitable one (R. 4, 9). During the period of one year next preceding *July 1, 1938*, and in its business of carrying exports of liquors, plaintiff owned and operated 7 trucks, operated a total of 25 trucks, employed 40 men, had a capital investment in excess of \$10,000.00, and realized net operating gains and profits in an amount exceeding \$7,500.00 (R. 10, 44). The business has been, and is, a growing and expanding one, and has present prospects of substantial increase in extent, volume, and net operating profits (R. 44):

Louisville is a city of the first class (R. 42), and all of plaintiff's operations in Kentucky have been in Louisville and within a radius of ten miles thereof, and so within the purview of those provisions of the *Ken-*



*tucky Motor Vehicle Transportation Act* (Ky. Stats., Secs. 2739j-42 and 2739j-94; App., 13 and 20), which grant exemption from compliance therewith, including obtention of certificate of convenience and necessity (R. 9, 10, 41, 43). (The exemption is valid. *Continental Baking Co. v. Woodring*, 286 U. S. 352; *Welch Co. v. New Hampshire*, 306 U. S. 79.)

Plaintiff complied with applicable regulatory Kentucky laws ante-dating the Control Law. In 1934 plaintiff made application to the Division of Alcoholic Control of the Department of Business Regulation of Kentucky for a special liquor transportation permit provided for by the then existing Kentucky law. The application was granted and a special liquor transportation permit was issued to the plaintiff, and thereafter, and from year to year, the permit was renewed and continued in effect, to and including *June 30, 1938*, the day preceding the date upon which the license provisions of the Control Law in question became effective. (R. 8, 9). On *July 27, 1936*, under a prior law, and upon plaintiff's application therefor, the Kentucky Department of Motor Transportation granted plaintiff a permit to transport whiskey and distilleries' supplies (R. 9). None of the permits or licenses so granted ever has been revoked or cancelled (R. 9).

On *May 20, 1937*, the plaintiff duly and properly designated a process agent in Kentucky (R. 9).

On *March 7, 1938*, the Governor of Kentucky signed and approved the *Control Law* (R. 11), the *license provisions* of which became effective *July 1, 1938*, and it



thereupon became incumbent upon plaintiff, if it were to continue to engage in its whiskey export business *conformably with the terms of the Control Law* (Sec. 18, Subsec. 7; App. 1, 5) to have and to possess the *liquor Transporter's License* provided for therein (R. 18).

In order to be eligible to obtain the liquor Transporter's License from the Kentucky authorities, it was necessary for plaintiff to have a *common carrier's certificate* issued by the Division of Motor Transportation of Kentucky (R. 15, *Control Law*, Sec. 54 (7), App. 10). Under the provisions of the existing and applicable Kentucky statutes, a motor carrier is eligible to receive the common carrier's certificate only (a) if applicant is engaged in the business of common carriage, and then only (b) upon establishing to the satisfaction of the Division of Motor Transportation that applicant's proposed operations are convenient and necessary in the public interest (Ky. Stats., Secs. 2739j-46 to 2739j-51; App. 14-16).

Obviously, the plaintiff being a contract carrier and not being engaged in the business of common carriage, is ineligible to receive the common carrier's certificate and, consequently, is ineligible to receive the liquor Transporter's License assumed to be required by the Control Law. Nevertheless, in order to comply with the pertinent Kentucky statutes insofar as the same properly might be regarded as valid inspection measures and registration requirements, plaintiff, on June 4, 1938, applied to the Division of Motor Transporta-



tion (1936 Governmental Reorganization Act, App. 21, 22) for a *common carrier's certificate* to operate a motor freight line from Louisville, Ky., to the Indiana state line over U. S. Highway No. 31, in interstate commerce only, and paid the required \$25.00 fee; on June 7, 1938, plaintiff applied for the *liquor Transporter's License*, paid the required \$10.00 fee, with surety executed and filed the required bond, and gave the required newspaper notice and filed proof thereof (R. 18, 19). June 23, 1938, upon the hearing of its application for a common carrier's certificate, plaintiff frankly stated and disclosed to the Director of the Division of Motor Transportation that plaintiff's business and operations were not those of a common carrier, but were those of a contract carrier, and that plaintiff sought the common carrier's certificate merely to render itself eligible to receive the liquor Transporter's License (R. 18). June 30, 1938, plaintiff's application for the common carrier's certificate was denied by the Director of the Division of Motor Transportation, who rested his decision upon the ground, expressed and assigned by him in writing, that the plaintiff had been, and was, engaged in the business of a contract carrier—that plaintiff had not been, and was not, engaged in the business of a common carrier of freight (R. 19, 62). Plaintiff's application for the common carrier's certificate having been denied, plaintiff (according to the terms of the Control Law) was rendered ineligible to receive the liquor Transporter's License (R. 19), and on July 8, 1938, the defendant,



James W. Martin, Commissioner of Revenue of Kentucky, and the aforementioned Alcoholic Beverage Control Board, denied plaintiff's application for the Transporter's License, and notified plaintiff of that denial (R. 20).

The Control Law assumes to provide extreme and severe penalties for a corporate motor carrier, its responsible officers and employees (maximum—*ten years and \$10,000.00*), who may undertake to engage in transporting liquors without holding the required Transporter's License, and for the seizure and confiscation, as contraband, of trucks so engaged and of cargoes of intoxicants carried by an unlicensed carrier (*Control Law, Secs. 52, 53, 89 and 94; App. 8, 9, 10; R. 14, 15, 16*). Subsequent to July 1, 1938, defendants threatened the plaintiff and its officers, employees, automotive equipment, and the plaintiff's customers' cargoes of liquors entrusted to plaintiff for carriage in *exportation from Kentucky in interstate commerce*, with enforcement of the Control Law's penal, criminal, contraband and confiscatory provisions, and unless enjoined and restrained by the Court, defendants intend to enforce, and will attempt to enforce, the Control Law's provisions (R. 21, 23). The threats of enforcement intimidated plaintiff's customers and caused them to discontinue doing business with the plaintiff, to plaintiff's great loss and damage (R. 21, 22). Continuance of the threats will destroy plaintiff's interstate liquor export transportation business, with resulting irreparable loss, not susceptible of defi-



nite ascertainment or statement in pecuniary terms, but in an amount exceeding \$75,000.00 (R. 22). For protection against that loss, and against the threatened seizures and forfeitures, and against threatened infliction of drastic fines and terms of penal servitude, and threatened prosecutions, plaintiff has no adequate remedy at law (R. 22, 23). The threatened civil, criminal, penal and confiscatory actions and proceedings exceed 10 in number, and would prove vexatious, unwarranted and unjustified (R. 63).

The complaint as amended charges the Control Law to be unconstitutional and repugnant to the Commerce, Due Process and Equal Protection Clauses, in that, under pain of excessive penalties, it assumes to bar plaintiff, in its character of an authorized interstate contract carrier, from continuing to engage in its established and profitable business of transporting exports of liquors from Kentucky in interstate commerce, exclusively (R. 22, 25, 26).

*The record further shows:*

July 18, 1938, plaintiff's original bill of complaint and the first amendment thereto praying that public officers of Kentucky be enjoined from enforcing or executing said control against plaintiff, were filed simultaneously in the U. S. District Court, for the Eastern District of Kentucky, and subpoena issued thereon was duly executed (R. 1, 25, 27). July 19, 1938, pursuant to notice, plaintiff made application for and was granted a temporary restraining order in conformity with the prayer of the bill (R. 28-33), and



plaintiff having announced to the Court that it proposed to apply for a preliminary injunction, the Judge of the District Court, pursuant to *Judicial Code, Sec. 266*, called to his assistance another District Judge and a Judge of the Circuit Court of Appeals for the Sixth Circuit, to hear and to determine the application for a preliminary injunction, which application the parties agreed might be heard at Louisville, Ky., on July 26, 1938 (R. 33). The notices to the defendants, Governor and Attorney General, of the application for the preliminary injunction and the hearing thereof, required by *Judicial Code, Sec. 266*, were duly served and waived (R. 32, 34, 37, 38, 64, 66). On July 26, 1938, and at Louisville, and before the Statutory Three-Judge Court, plaintiff filed its motion for a preliminary injunction in conformity with the prayer of the complaint and supporting affidavits, defendants filed their motion to dissolve the temporary restraining order and to dismiss the complaint as amended; upon suggestion of the Court and by agreement of the parties, by counsel, consideration of the application for the preliminary injunction was deferred until the cause might be heard upon defendants' motion to dissolve the restraining order and to dismiss the complaint; arguments were heard upon defendants' mentioned motions, consideration of the motion for the preliminary injunction was deferred, the temporary restraining order was continued in effect pending determination of the motion to dismiss, and *the restraining order thereby virtually was converted into a preliminary injunction* (R. 35-38).



While the cause was under submission upon defendants' motion to dissolve and to dismiss, and with the assent of defendants' counsel, courteously granted, plaintiff filed second and third amendments to its bill, which amendments did not alter the nature of plaintiff's claim for relief (R. 38-47, 62-64). The motions to dissolve and to dismiss were extended to the bill as thus amended (R. 48, 64, 66).

On October 15, 1938, the Court rendered its *Opinion*, holding, as a matter of law, that the Control Law is not repugnant to the Constitution, but represents a valid exercise of the State's police power (R. 48-62).

On November 22, 1938, the Three-Judge Court entered a *final decree* which, among other things, set aside so much of the Court's prior order as had deferred consideration of plaintiff's application for a preliminary injunction, ordered the cause submitted forthwith upon that motion, and overruled the same. The final decree likewise sustained defendants' motion to dissolve the temporary restraining order and to dismiss the complaint as amended, and dismissed the complaint accordingly. The final decree below extended the Court's Opinion to the complaint as amended, including the third amendment thereto, and constituted that Opinion the Court's *Conclusions of Law*, and stated that the Conclusions *express the sole and exclusive grounds upon which the Court held the Control Law to be constitutional* and the plaintiff not to be entitled to the injunctive relief prayed. To protect the plaintiff's rights, the decree granted plaintiff



exceptions and an injunction pending this appeal (R. 65-70).

The appeal was seasonably and duly prayed, allowed and perfected (R. 71-85).

#### IV.

#### **SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED.**

Appellant will urge the following assigned errors specified both in its Assignment of Errors and in its Statement of Points to be Relied Upon (R. 73-77; 79-83), to-wit:

The Court below *erred*:

1. In overruling plaintiff's motion for a preliminary injunction;

2. In sustaining defendants' motion to dissolve the temporary restraining order;

3. In sustaining defendants' motion to dismiss the complaint as amended, and in dismissing the same;

4. In determining and ruling, and in stating as its *Conclusions of Law*, and in making the same the grounds of its action in rendering the aforesaid decisions, and each of them,—

(a) That in application to the plaintiff and its business, the Control Law does not contravene the *Commerce Clause, Art. 1, Sec. 8, Cl. 3*, of the Constitution of the United States;

(b) That in application to the plaintiff and its business, the Control Law only remotely and incidentally affects and burdens interstate



commerce, and that it does not represent and constitute a direct and substantial burden upon, interference with, and obstruction and prohibition of commerce along the several states;

- (c) That regulation by the General Assembly of Kentucky of the transportation of intoxicants by motor carriers of property for hire in export from Kentucky to sister States, and the General Assembly's action in prohibiting interstate contract carriers of property by motor vehicles for hire (including plaintiff), from continuing to engage in such interstate exportation business, is a matter of local concern, as distinguished from a matter of National concern;
- (d) That the Congress of the United States by Motor Carrier Act, 1935, has not legislated with respect to the transportation of such intoxicants by contract carriers by motor vehicles for hire in export in interstate commerce;
- (e) That National legislation governing and controlling interstate transportation, exportation, and exports, of the kind and character aforesaid, is lacking;
- (f) That the supposed omission of Congress to legislate with reference to the subject of transportation by contract carriers by motor vehicle for hire of intoxicating liquors exported in interstate commerce, is equivalent and tantamount to an invitation by the Congress to each of the several States to enact its own laws governing said supposed open field of regulation;



- (g) That such liquors, sold and consigned by the aforementioned vendors and consignors thereof, and to be delivered pursuant to the contracts of sale to the consignee-purchasers thereof, domiciled and residing in Indianapolis, Chicago, and other points situated north of the Ohio River, and delivered to the plaintiff in Louisville and immediate environs, intended, consigned and destined for immediate, direct and continuous carriage for delivery to the consignees at their places of residence and business location, are not to be regarded as being in interstate commerce or entitled to the protection of the Commerce Clause;
- (h) That because it is competent for a state to prohibit the manufacture of such intoxicants, then if a state permits the manufacture thereof it is competent for the state to control the manufactured product, which includes power to control the transportation thereof in exportation in interstate commerce from such state to a sister state;
- (i) That State police powers should be broadened;
- (j) That the Control Law, in application to plaintiff and its business, in assuming to require plaintiff—as a condition precedent to continuing to engage in its business—to convert itself into a common carrier of property by motor vehicle for hire, to assume the added burdens and stricter liabilities appertaining to carriers of that character, and to establish to the satisfaction of Kentucky authorities that plaintiff's operations are convenient and



necessary in the public interest, does not constitute a taking of plaintiff's property without due process of law in contravention of the *Due Process Clause of the 14th Amendment* to the Constitution;

- (k) That the Control Law's provisions, prohibiting plaintiff, merely because it is a "contract" (instead of a "common") carrier of freight by motor vehicle for hire in interstate commerce, from continuing to engage in the conduct of its established, profitable and exclusively interstate business of transporting exports of whiskey from Kentucky, is a valid and reasonable regulation within the proper exercise of the police power of the State;
- (l) That the Control Law, in providing that common carriers of property by motor vehicles for hire shall be eligible to transact such business of transporting exports of intoxicants from Kentucky in interstate commerce, and in declaring contract carriers of property by motor vehicles for hire, including plaintiff, to be ineligible to engage in said business, and, further, in providing penalties for violations of its mentioned provisions so extreme and severe as to preclude resort to the Courts in ordinary course, does not deny plaintiff the equal protection of the laws and does not deprive plaintiff of its property without due process of law; and
- (m) That in determining the question of the validity and constitutionality of said Control Law it is incompetent for the Court to take cognizance of the Kentucky General Assembly's attempt and design to give common car-



riers of property by motor vehicles for hire a competitive advantage over *contract* carriers of property by motor vehicles for hire, by permitting the former class of motor carriers to engage, and by prohibiting the latter class of motor carriers from engaging, in the aforementioned business of interstate transportation of intoxicants in export from Kentucky.

## V.

### ARGUMENT.

#### (A) Summary of Argument.

The argument for appellant may be summarized:

1. The cases involving *intrastate* business may be put to one side as irrelevant. *Interstate* commerce cases of three distinct categories are distinguishable:

(a) Cases sustaining state regulation or prohibition of interstate commerce in noxious commodities which inherently are not the proper subjects of trade or commerce; (b) cases decided under the Webb-Kenyon Act and 21st Amendment, sustaining state regulation of *importation* of intoxicants in interstate commerce; and (c) cases sustaining exertions of the state's police power reasonably to regulate the *manner* of use made of its highways by interstate carriers by motor vehicle, in the absence of Federal legislation coinciding in the field.

These three types of cases respectively are distinguishable from the case at bar, because:

(a) Liquor is a legitimate subject of interstate commerce; (b) only *exports* of liquor are here in-



volved; and (c) the Control Law does not assume to regulate the use of the highways, and if it did so assume, the act would be invalid under the Constitution of Kentucky, Sec. 51, because the suggested subject is not mentioned in the act's title and the body of the act would relate to more than the single subject permitted, and the Control Law would be invalid for the further reason that the Control Law does not seek to regulate the *manner of use*, but rather to define *by whom* the highways may be used, and thus collides with both the Commerce Clause and with Motor Carrier Act, 1935, which authorize use of the highways by contract carriers of "property" by motor vehicle in interstate commerce.


2. In assuming to prohibit plaintiff, in its character of contract carrier by motor vehicle, from continuing to engage in its established business of transporting intoxicating liquors from Kentucky, exclusively in export and exclusively in interstate commerce, the *Control Law* constitutes a direct and substantial interference with interstate commerce in a matter of National concern, admitting of and demanding uniformity of treatment, conflicts with the commerce powers of the National Government and is, therefore, void.

3. *Motor Carrier Act, 1935*, controls interstate transportation by motor carriers of "property," generally (which includes intoxicating liquors), and with other Federal legislation, occupies the field of regulation, and supersedes the conflicting Control Law.



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4. In assuming to require plaintiff to convert itself into a *common carrier* of property by motor vehicle as a condition precedent to the exercise of plaintiff's constitutional right to continue to conduct its mentioned interstate export business, the *Control Law* deprives plaintiff of its property without due process of law.

5. The classification attempted to be made by the Control Law rendering *common carriers* by motor vehicle *eligible* to obtain the liquor Transporter's License and to engage in the business of transporting *exports* of whiskey from Kentucky, and rendering *contract carriers* by motor vehicle *ineligible* to obtain the requisite Transporter's License and therefore ineligible to continue to engage in the mentioned business—constitutes mere arbitrary selection, in that the distinction attempted to be drawn bears no reasonable relation to proper regulation of the liquor traffic, and the spurious classification consequently denies plaintiff the equal protection of the laws.

6. For violation of its terms, consisting in plaintiff undertaking to transport export cargoes of intoxicants from Kentucky in interstate commerce, the Control Law prescribes penalties so severe and extreme as to preclude resort to the Courts in ordinary course to test the validity of the mentioned interference with interstate commerce, with the consequence that the *Control Law*, on its face, further denies plaintiff the equal protection of the laws and assumes to deprive plaintiff of its property without due process.



7. The District Court below committed additional errors in making its *Conclusions of Law*, and in acting thereon in denying plaintiff injunctive relief, *because contrary to those Conclusions*:

(a) The Court possesses power to penetrate the transparent legislative design, embodied in the Control Law, to drive contract carriers by motor vehicle, including plaintiff, from the business of transporting liquors in export from Kentucky in interstate commerce, and legislatively to make a gift of plaintiff's established business to common carriers;

(b) If existent, the omission of Congress—erroneously supposed by the Court below to exist—to regulate the interstate export business in question would not be deemed an invitation extended by Congress to the states to regulate the business, but would evince the will of Congress that the business should remain unfettered;

(c) Export cargoes of intoxicants, upon delivery to the plaintiff in Jefferson County, Kentucky, destined and consigned for immediate, continuous and uninterrupted carriage for delivery to consignee-purchasers in Indiana and Illinois, are in interstate-commerce and are protected by the Commerce Clause;

(d) Physical science may postulate that the greater includes the lesser, but although a state may prohibit the manufacture of liquor, if a state permits distillation, sale and transportation—as Kentucky does—the rule of law is that the state may not annex to its consent to manufacture and sell the unconstitutional ban



upon carriage of interstate exports of liquors by contract carriers; and

(e) There is no authority for the proposition that the Court, deliberately and on its own motion, should enlarge the state's police power so that it transcends or outweighs the commerce powers of the National Government.

8. None of the cases cited in the *Opinion* below is in point, or even tends to support the Conclusions of Law, or the rulings and decisions complained of upon this appeal, or any of them.

9. The requisite jurisdictional amount is in controversy.

10. The action was not prematurely brought.

11. Appellant is without adequate remedy at law.

**(B) Distinguishable Situations in State Regulation of Matters Affecting Interstate Commerce.**

The cases involving *exclusively intrastate business*, such as *Interstate Busses Corp. v. Holyoke Street Railway Co.*, 273 U. S. 45, 71 L. Ed. 530; *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U. S. 335, 76 L. Ed. 323; *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, and (despite the subterfuge there attempted), *Eichholz v. Public Service Comm.*, — U. S. — (decided February 27, 1939), may be put to one side. National commerce power is not pertinent to the determination of such cases.

Coming to the cases of *interstate transactions*, and to put our contentions in sharpest focus, we desire at



the outset to concede that in *three types of distinguishable situations* it is competent for the state to exercise its regulatory powers with respect to matters affecting interstate transportation and commerce.

*The first distinguishable situation* is one in which a state undertakes to regulate interstate commerce in *commodities* which by reason of their essential nature are *not legitimate subjects of trade and commerce*. In such cases—at least where the state's action imposes only an incidental interference and Congress has not occupied the field by legislation of its own—it is competent for the state to regulate the commerce in *noxious substances*, despite its interstate character. A recent decision in this field—*Clason v. Indiana*, — U. S. — (decided March 27, 1939)—sustained an Indiana statute regulating the transportation of the decaying carcass of a horse over the state's highways enroute to Illinois. An earlier case of this same type is *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, where the Court sustained the validity of a Florida statute which made it unlawful for any one to sell, offer for sale, ship or deliver for shipment, any citrus fruit which was immature or otherwise *unfit for consumption*, the Court basing its decision on the grounds that there was no conflicting Act of Congress and that *unwholesome foods* are not legitimate subjects of trade and commerce. The District Court below relied upon *Sligh v. Kirkwood*, *supra*, and regarded liquors, apparently, as a commodity on a parity with unsound and unwholesome food-stuffs, rather beyond the pale, and ineligible



to receive the protection of the Commerce Clause (R. 54, 60, 62). However, despite the Webb-Kenyon Act and kindred Federal legislation, and the 21st Amendment to the Constitution (App. 37-47), insofar as the *exportation* of intoxicating liquors in interstate commerce is concerned, the commodity is a legitimate subject of commerce and is fully entitled to the protection of the Commerce Clause, as is shown *infra*, pp. 34-68.

The second distinguishable situation is presented by cases which have arisen subsequent to the enactment of the Webb-Kenyon Act and the adoption of the 21st Amendment, and which represent efforts by the states to regulate *importations* of intoxicants. Cases of this type are *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 61 L. Ed. 326 (decided under the Webb-Kenyon Act) and *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 81 L. Ed. 38; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401, 82 L. Ed. 1424; *Indianapolis Brewing Co. v. Liquor Control Comm. of Mich.*, 305 U. S. 391, 83 L. Ed. 236, and *Finch & Co. v. McKittrick*, 305 U. S. 395, 83 L. Ed. 238 (all decided under the 21st Amendment). The case at bar is distinguishable from these five cases in that it presents attempted regulation of *exportation* in interstate commerce, and no authority exists, either under the 21st Amendment or under any Congressional legislation, empowering a state to regulate such exportation.



*The third distinguishable situation* is presented in motor carrier cases deciding, that to safeguard its highways and the traveling public, a state may make reasonable regulations concerning the manner of the highways' use, provided (a) there is an absence of congressional action, and (b) that the matters regulated are matters of merely local concern and that interstate commerce is affected only incidentally and remotely. This third type includes the following decisions:

The state may require the driver of the vehicle to procure a *license* (*Hendrick v. Maryland*, 235 U. S. 610, 59 L. Ed. 385; *Kane v. New Jersey*, 242 U. S. 160, 61 L. Ed. 222), and to *designate an agent for service of summons* (*Kane v. New Jersey*, *supra*). Where state authorities *waive* the requirement, expressed in the statute, that the interstate carrier shall show *public convenience and necessity* and the statute is administered so as to require nothing more than a certificate of *permission and registration*, the statute is valid (*Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199). Where the route for which the certificate was sought was badly *congested*, and applicant's additional operations would have been *detrimental to public safety*, and it did not appear that an alternate route was not available, the state's denial of the certificate was proper (*Bradley v. Public Util. Comm.*, 289 U. S. 92, 77 L. Ed. 1053). Where the routes already were too heavily *congested*, the proposed operations would have been inimical to the *safety and convenience* of the other users of the



highways and would have interfered unreasonably with the public use of the highways, would have constituted an undue burden on the highways, and would have endangered weak bridges on some of them, denial of the application was proper (*Wald Transfer & Storage Co. v. Smith*, 290 U. S. 596, 78 L. Ed. 524, modified on rehearing, 290 U. S. 602, 78 L. Ed. 528). Basically the same, is *McDonald v. Thompson*, 305 U. S. 263, 83 L. Ed. 168, holding the common motor carrier's actual operations not to have been "*bona fide*" subsequent to the state Railroad Commission's denial of the carrier's application rested on the ground that the proposed operations would have subjected the highways to *excessive burdens and would have endangered and interfered with ordinary use by the public*, and where—as is shown by the opinion in the Court below (*Thompson v. McDonald*, 95 Fed. (2d) 937, 941)—the state Commission *waived* statutory provisions requiring the carrier to establish *public convenience and necessity*, in which latter aspect the case is within the rule of *Clark v. Poor*, *supra*. It is competent for the state to require the carrier to furnish *insurance policies*, or a surety bond, for the protection of third persons who may be injured or damaged by the proposed operations (*Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155; *Hicklin v. Coney*, 290 U. S. 169, 78 L. Ed. 247). The state may impose reasonable limits upon drivers' hours of continuous service (*Welch Co. v. New Hampshire*, 306 U. S. 79). The state may prescribe *maximum loads* (*Morris v. Doby*, 274 U.



S. 135, 71 L. Ed. 966; *Sproles v. Binford*, 286 U. S. 374, 76 L. Ed. 1167; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734; similarly, may limit the width of vehicles (*South Carolina State Highway Dept. v. Barnwell Bros.*, *supra*). The state may exact fair compensation from the interstate operator for the use of the state's highways, whether based on mileage (*Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. Ed. 551), or upon gross ton miles (*Continental Baking Co. v. Woodring*, *supra*), or upon the horsepower of the vehicles (*Kane v. New Jersey*, *supra*; *Hendrick v. Maryland*, *supra*), manufacturer's rated capacities (*Dixie Ohio Express Co. v. State Revenue Comm.*, 306 U. S. 72), or by units, as by exacting a fixed fee for each vehicle transported for sale (*Morf v. Bingaman*, 298 U. S. 407, 80 L. Ed. 1245), or based upon the carrying capacity of the vehicles (*Hicklin v. Conely*, *supra*) or based on the kind of use (*Clark v. Paul Gray, Inc.*, — U. S. —, decided April 17, 1939), and the state may exact reasonable fees to defray the expenses of the department charged with the inspection and regulation of motor vehicles (*Kane v. New Jersey*, *supra*; *Clark v. Paul Gray, Inc.*, *supra*), but not excessive fees (*Ingels v. Morf*, 300 U. S. 290, 81 L. Ed. 653).

Nothing in the Control Law's provisions warrants interpreting that act to be a measure designed to regulate the use of the highways and thus to be within the scope of the rule of the distinguishable cases of the third category. And if such legislative purpose were



to be ascribed to the Control Law, the act thereby would be rendered void under Kentucky Constitution, Sec. 51:

“LAW SHALL RELATE TO ONE SUBJECT; TITLE; AMENDMENT.—*No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended, or conferred, shall be re-enacted and published at length.*” (Italics ours.)

In obedience to this Constitutional mandate, Kentucky Statutes relating to more than one subject, or to a subject unexpressed in the title, consistently have been held void by the Court of Appeals of Kentucky. (*Hind v. Rice*, 10 Bush, 528; *Jones v. Thompson*, 12 Bush 394; *Wiemer v. Commissioners of Sinking Fund*, 124 Ky. 377, 99 S. W. 242; *Board of Trustees v. Tate*, 155 Ky. 296, 159 S. W. 777; *Thompson v. Comm.*, 159 Ky. 8, 166 S. W. 623; *Wood v. Comm.*, 225 Ky. 294, 8 S. W. (2d) 428; *City of Owensboro v. Hazel*, 229 Ky. 752, 17 S. W. (2d) 1031; *Loveless v. Comm.*, 241 Ky. 82, 43 S. W. (2d) 348. The Control Law's title showing the Act to be devoted to regulation of manufacture and sale of intoxicants, is set forth in the bill (R. 10, 11). Nothing in the title indicates the Act to have the separate and alien purpose of regulating use of Kentucky's highways. Under the Kentucky Constitution the Control Law cannot relate to a second subject entirely divorced from control of the liquor business, such as protection of highways. Consequently, unless its



substantive provisions imperatively so require—and they do not—the Control Law should not be interpreted to pertain to regulation of the use of highways. However, if the Control Law's substantive provisions be deemed to represent an effort to regulate the use of the highways, then the Act is invalid for the additional reasons that it (a) relates to *two* subjects, (b) only one of which is expressed in the title, and thereby—and in two particulars—offends Section 51 of the Kentucky Constitution. It would be competent for the Court to pronounce against the Control Law's validity on that ground; independently of the Federal questions. (*Greene v. Louisville & I. R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280; *Glenn v. Field Packing Company*, 290 U. S. 177, 78 L. Ed. 252). However, the ordinary rule of interpretation requires that where possible a statute be construed in such manner as not to render it unconstitutional. (*Fischer v. Grieb*, 272 Ky. 166; *Wadley, etc., R. Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. 405.) So construing the Control Law, it must be held to have no relation whatever to the conservation or regulation of the use of highways traversing Kentucky.

We concede the mentioned effect and implication of the distinguishable cases of the third category. However, the decisions therein probably roughly mark and define the boundaries of the States' powers with respect to the regulation of interstate carriers, for, on the other side of the dividing line, we find that a State's admitted power over corporations, ample though it is, does not include the right to exclude a corporation from engaging in interstate commerce within its territorial



confines, as the Control Law assumes to do (*The Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. Ed. 378; *L. & N. R. R. Company v. Eubank*, 184 U. S. 27, 46 L. Ed. 416); prohibiting a single interstate carrier from conducting its business—as the Control Law undertakes to do—constitutes a direct, substantial and prohibited burden upon, and interference with, interstate commerce (*L. & N. R. R. Co. v. Eubank*, *supra*); neither the State, nor a municipal subdivision thereof, may exact an occupation tax for the privilege of transacting interstate business (*Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483; *Sprout v. South Bend*, 277 U. S. 163, 72 L. Ed. 833; *Interstate Transit Co. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953; *Dixie Ohio Express Co. v. State Revenue Comm.*, *supra*), and because the same is a direct burden upon interstate commerce, a State may not impose a license tax of \$25.00 upon a motor carrier—as a “distributor” of gasoline, by statutory definition—which fills its trucks’ tanks with gasoline in a sister State, and in conducting its interstate operations traverses the taxing State, consuming the gasoline as fuel the while. (*Bingaman v. Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928.)

The case at bar does not fall within the categories of the three distinguishable types of cases cited, because liquor—in export—is not, *ipso facto*, contraband, and is entitled to the protection of the Commerce Clause, and furthermore, because the Control Law’s attempted ouster of plaintiff is not a reasonable, non-discriminatory regulation, causing only incidental and remote interference with interstate commerce, imposed in the



absence of Congressional action, but, on the contrary, assumes to impose a positive and complete prohibition upon the plaintiff as a contract carrier and thus undertakes to obstruct operation of an instrument of interstate commerce operating under the sanction of the Interstate Commerce Commission, to which Commission Congress, by legislation occupying the field, exclusively confided the regulation of such carriers. If a state may not exact of an interstate motor carrier payment of a license tax for the privilege of doing business—and cases previously cited show that a state positively may not do so—then *a fortiori*, it would be startling to find that Kentucky may prohibit plaintiff from continuing to conduct its business in its character of contract carrier. The attempted ban of the Control Law is a more direct and substantial interference than were the interferences involved and condemned in *Barrett v. New York*, *Sprout v. South Bend*, and *Bingaman v. Golden Eagle Western Lines*, *supra*. The case at bar is a stronger case than those. Decisions later cited, rested upon the suggested principle, and upon their facts bearing close resemblance to the case at bar, unequivocally hold the Control Law's ban to be ineffectual and void.



**(C) In Export, Intoxicating Liquor Is a Legitimate Subject of Interstate Commerce, and Is Protected by the Commerce Clause.**

To the simplest transaction of interstate commerce there obviously are two aspects—exportation from State A. and importation into State B. Prior to the enactment of the *Wilson Act*, the *Webb-Kenyon Act*, and the adoption of the *21st Amendment* (App. 37, 38), the powers of the National Government, and the *limitations* upon the powers of the states, were identical with respect both to the importation and exportation of intoxicating liquors. By that Federal legislation and the Constitutional Amendment, the states' regulatory powers have been *created* with respect to *imports*, but with respect to *imports alone*. By inherent expression, those Federal laws are restricted to importation, and *exportation in nowise has been affected thereby. So far as exportation is concerned, the original limitations upon the state's regulatory powers persist.*

As would be expected, the states' regulatory efforts have been addressed chiefly to the prevention of importation of liquor. It is only recently that states have attempted to control exports of intoxicants otherwise than by attempting (unsuccessfully) to impose a license tax thereon. The consequence is that almost all of the Federal cases heretofore adjudicated involve questions of attempted state regulation of importation. However, cases involving imports which arose prior to and in the absence of the enactment of the previ-



ously mentioned Federal legislation, presently constitute authority with respect to exports, because the Constitution speaks neither of "exports" nor "imports," but speaks of "commerce among the several states," and insofar as exports now are concerned the situation presently existing is identical with that formerly existing with respect to imports and exports, indifferently. It would seem plain that if prior to the enactment of the mentioned Federal legislation and the adoption of the 21st Amendment, the states were powerless to regulate interstate imports of liquors, then despite the enactment of that legislation and the adoption of the Amendment (the operative effect of which is limited to imports) the states continue powerless to regulate exports of liquors in interstate commerce.

Unlike the unsound citrus fruits and decaying animal carcasses involved in *Sligh v. Kirkwood* and *Clason v. Indiana* (*ante*, p. 25), prior to the enactment of the mentioned Federal legislation (and exclusive, of course, of the period of National Prohibition), intoxicating liquors, imported into "dry" territory invariably were held to be legitimate subjects of interstate commerce and to be protected by the Commerce Clause, as against attempts of the states to prohibit, to directly burden, or to regulate, interstate commerce therein. Insofar as protection under the Commerce Clause was concerned, no distinction whatever was drawn between shipments of intoxicating liquors and shipments of wheat, beef or pig-iron, all being legitimate articles of trade. As was said in



WILKERSON v. RAHRER,  
140 U. S. 545, 35 L. Ed. 572.

"Unquestionably, fermented, distilled or other *intoxicating liquors* or liquids are subjects of *commercial intercourse*, exchange, barter and traffic, between nation and nation, *between State and State*, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world; the laws of Congress and the decisions of courts." (Italics ours.)

*Equivalent expressions* concerning intoxicants are to be found in *Leisy v. Hardin*, 135 U. S. 190, 34 L. Ed. 128; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100; *Adams Express Co. v. Ky.*, 214 U. S. 218, 53 L. Ed. 972; *L. & N. R. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355; and *Rosenberger v. Pac. Express Co.*, 241 U. S. 48, 60 L. Ed. 880, and that such is the rule is implicit in the decisions in *Bowman v. Chicago, Etc., R. R. Co.*, 125 U. S. 465, 31 L. Ed. 700; *Rhodes v. Ia.*, 170 U. S. 412, 42 L. Ed. 1088; *American Express Co. v. Iowa*, 196 U. S. 133, 49 L. Ed. 417; *Adams Express Co. v. Ia.*, 196 U. S. 147, 49 L. Ed. 424; *Kirmeyer v. Kansas*, 236 U. S. 568, 59 L. Ed. 721; *Adams Express Co. v. Ky.*, 206 U. S. 129, 51 L. Ed. 987. In all of these cases state statutes—purportedly enacted in the exercise of the *police power*—assuming to prohibit or to regulate *imports* of intoxicants, were held void because in conflict with the commerce powers of the Nation. It was these cases which caused the enactment of legislation of the type of the Wilson Act and



Webb-Kenyon Act, without which the states were powerless to regulate imports.

The same rule has been applied with respect to *exports*.

HEYMAN v. HAYS,  
236 U. S. 178, 59 L. Ed. 527.

State and County privilege taxes of Tennessee, sought to be imposed upon a wholesale liquor dealer who had on hand in the state a stock of liquors, and who sold the same by mail orders solicited from persons in other states and by delivering the merchandise to a carrier for through transportation *out of* Tennessee, were held unconstitutional as burdens on interstate commerce. In so deciding that such export traffic could not be burdened, and in repelling the offered technical objection that the carrier being the agent of the customer, the sale was consummated in Tennessee upon delivery to the carrier, and that thus the business was not interstate commerce but strictly Tennessee business and therefore subject to taxation, the Court answered that in determining the character of a particular transaction, substance, rather than form, controls.

Inasmuch as prior to the enactment of the mentioned Federal legislation intoxicants were legitimate articles of interstate trade and commerce, and under the Commerce Clause a state could not regulate either the importation or exportation thereof in interstate commerce, then presently, and despite existing Federal legislation conferring authority upon the states to regulate importation and despite the adoption of the 21st Amendment, likewise restricted in operative effect to



imports, interstate exports of intoxicants remain legitimate articles of commerce and a state cannot prohibit or regulate the exportation thereof in interstate commerce. The result is that the case at bar is in no sense novel in that the business in question consists in transporting exports of liquors from Kentucky in interstate commerce, and it is no more competent for Kentucky to prohibit Ziffrin, Inc., from transporting such exports of Kentucky whiskies than it was for Tennessee to exact a privilege tax from Heyman (*Heyman v. Hays, supra*) or for Michigan to prohibit Duke, another contract carrier, from transporting exports of automobile bodies from Detroit to Toledo (*Mich. Pub. Util. Comm. v. Duke*, 266 U. S. 570, 69 L. Ed. 445, *infra*, p. 44).

The District Court below was not justified in taking the position—as it did—that *exports* of liquor in interstate commerce are not entitled to the same protection accorded other lawful commodities (*Opinion, constituted Conclusions of Law*; R. 67; 60, 61): If we err in this view, then admittedly the commerce power cases cited in succeeding sections of this brief, dealing—as they do—with transportation of legitimate commodities, generally, are not in point, and our Commerce Clause contentions are not well taken, although appellant's challenges under the 14th Amendment would remain. On the other hand, if our reading of the cases is correct, and if in interstate commerce no distinction properly is to be drawn between exports of whiskey and exports of natural gas, automobile bodies, and other lawful subjects of trade, then the commerce



power cases cited in the next succeeding section of this brief conclusively demonstrate the unconstitutionality of the Control Law in application to plaintiff and its business.

**(D) The Control Law Conflicts With the Commerce Clause.**

In assuming to prohibit plaintiff from continuing to engage, in its character of contract carrier, in its business of transporting intoxicating liquors from Kentucky, *exclusively in export and exclusively in interstate commerce*, the Control Law constitutes a direct and substantial interference with interstate commerce, conflicts with the commerce powers of the National Government and is, therefore, void.

It previously has been stated that plaintiff's business here involved consists exclusively in transporting export cargoes of intoxicating liquors from Louisville, Ky., and immediate environs, to Indianapolis and Chicago, and to other points lying north of the Ohio River (*ante*, pp. 7, 8) that plaintiff applied for and was denied a liquor Transporter's License because it had been denied a Common Carrier's Certificate of public convenience and necessity, and that plaintiff applied for and was denied that Certificate because plaintiff openly acknowledged itself to be, and is, a *contract carrier* of freight and not a *common carrier* of freight. The provisions of the Kentucky statutes pertaining to these features of the case deserve close examination.



The *Control Law* provides, *Section 89* (App. 10), that no person except a railroad company, or a railway express company, or a *holder of a license authorized by Section 18* of the *Control Law* shall transport distilled spirits, or cause the same to be transported. *Section 18* of the *Control Law* makes provision for a variety of licenses for distillers, rectifiers, vintners, wholesalers and retailers. For none of these licenses is plaintiff, or any other motor carrier, eligible. However, in *sub-paragraph 7 of Section 18*, the *Control Law* provides for a "*License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10.00 per annum*" (App. 5). This is the *liquor Transporter's License* hereinbefore mentioned, and is the only license for which any motor carrier is eligible. The *Control Law, Sec. 54, subparag. 7* (App. 10)—fusing its regulations with those of the *Motor Vehicle Transportation Act*—provides that the *Transporter's License* shall be issued only to persons who are authorized by proper certificate from the *Kentucky Division of Motor Transportation* to engage in the business of a common carrier. It is this subsection of the *Control Law* which integrates, and incorporates by reference, the provisions of the *Kentucky Motor Vehicle Transportation Act* which govern the issuance of certificates of convenience and necessity to common carriers by motor vehicles. The *Control Law*, by reference, thus imposes as eligibility qualifications for the recipient of a *liquor Transporter's License* all of the eligibility qualifications required of a com-



*mon carrier under the Kentucky Motor Vehicle Transportation Act.*

In *Sec. 52, the Control Law* (App. 8) provides that it shall be a criminal offense for any person to transport intoxicating liquors without first having paid the license tax required by the Control Law and without first having obtained the license required thereby. *Sec. 94* (App. 10) provides that any person who, by himself or acting through another, directly or indirectly, violates the provisions of *Sec. 52* shall be deemed guilty of a crime, and upon conviction shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00, or by imprisonment not to exceed 5 years, or by both such fine and imprisonment; that for a second and each subsequent offense the offender upon conviction shall be fined not less than \$500.00 and not exceeding \$10,000.00, or imprisoned not exceeding 10 years, or both so fined and imprisoned, and further provides that if the offender be a corporation, then the principal officer, and the officers responsible for such violation, may be punished by such imprisonment. *Sec. 53, in sub-paragraphs 2 and 6*, declares liquors in the possession of any person not entitled to possession of the same conformably with the provisions of the Control Law, and any motor vehicle in which any person is illegally possessing or illegally transporting alcoholic beverages, to be contraband, and in its concluding paragraph further provides for the seizure, without warrant, of contraband, and for the condemnation and confiscation thereof (App. 9, 10).



The funicular language of the *Control Law, Sec. 54, subparag. 7*—providing that a *Transporter's License* shall be issued only to a motor carrier holding the *proper certificate from the Division of Motor Transportation to engage in the business of a common carrier*—makes integral parts of the Control Law, certain provisions of the *Kentucky Motor Vehicle Transportation Act* to the following effect:

*Ky. Stats., Sec. 2739j-42, sub-secs. "c" "d" and "f,"* (App. 13, 14), defines a *common carrier* to be the operator of a motor vehicle for hire in *common carriage*, and a *contract carrier* to be any operator of a motor vehicle for hire *other than a common carrier*, and it defines the "Certificate" to be the certificate of public convenience and necessity authorized to be issued under the Transportation Act. In order to secure and retain the certificate of public convenience and necessity, the motor carrier—

(a) *must be a common carrier*, that is, engaged for hire, in common carriage to an extent adequate to serve the needs of the public (*Ky. Stats., Sec. 2739j-Sub-secs. 42, 50, 51 and 57; App. 13, 15, 16, 17*);

(b) *must obtain a certificate of public convenience and necessity*, upon sworn application filed and upon payment of fee, after notice to competing carriers, over their protests, if any, upon production of requisite proof and after hearing, and upon establishing to the satisfaction of the Division of Motor Transportation that the operation for which authorization is sought by the applicant is convenient and necessary in the public interest, that applicant possesses facilities where-



with efficiently to perform the service, and that the proposed operation will not prove detrimental to the public transportation business of other carriers of every character within the territory sought to be served by the applicant (*Ky. Stats., Sec. 2739j., Sub-secs. 45 to 51, inclusive; App. 14-17; Reorganization Act, App. 21, 22*); and

(c) having obtained the common carrier's certificate, the carrier must adhere to the rates specified in its filed schedule (*Ky. Stats., Sec. 2739j-59, App. 17*) and must submit to state regulation and modification of its rates, charges and services (*Ky. Stats., Sec. 2739j-61; App. 18*).

Thus, the Control Law encapsulates the Motor Vehicle Transportation Act, and in order to render itself eligible to obtain the indispensable liquor Transporter's License, plaintiff, Ziffrin, Inc., needs must acquire and hold a common carrier's Certificate, which, under the Transportation Act, plaintiff may secure *only if plaintiff converts its business from that of a contract carrier into that of a common carrier*, and thereby assumes and incurs the additional burdens and greater liabilities appertaining to common carriers provided both by statutory enactments and by the common law—among others, that the plaintiff hold itself out to the general public to carry for the public without discrimination at reasonable and regulated rates, that plaintiff provide adequate service for the general public in the carriage of all varieties of freight, and that plaintiff assume the strict liability of a common carrier for the safe delivery of freight entrusted to it. Moreover, plaintiff must es-



tablish—to the satisfaction of Kentucky officials—that it possesses the facilities and equipment requisite for such expanded operations, that its proposed operations are necessary and convenient in the public interest and will not prove detrimental to the business of any other carrier whatsoever, and plaintiff must agree to submit to regulation and modification of its charges and services.

The decree appealed from herein holds that Kentucky may make those exactions of this appellant. In so determining, the decree below is inconsistent with (a) the rule of *Heyman v. Hays*, (*ante*, p. 37), (b) the rule established by the long, unbroken line of cases—of which *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649; *Western Union Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, and *Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483, are typical—holding that a state may not require a *license* for conducting interstate commerce, as the Control Law attempts to do by requiring a liquor Transporter's License of interstate operators; and (c) the rule of the four cases next cited, which hold that a state cannot make such exactions as the Control Law proposes, and that an attempt to do so is a direct, substantial and prohibited interference with, and burden upon, interstate commerce.

**MICHIGAN PUBLIC UTILITIES COMMISSION  
v. DUKE (1925),  
266 U. S. 570, 69 L. Ed. 445.**

The plaintiff, Duke, a *contract carrier* by motor vehicle, was engaged exclusively in conducting the busi-



ness covered by three contracts which he held for transporting, from Detroit, Mich., to Toledo, O., the automobile bodies made at the plants of three body manufacturers in Detroit and intended for the use of an automobile manufacturer at Toledo. Plaintiff sought to enjoin Michigan authorities from enforcing against him a Michigan statute which denied plaintiff the right to conduct his business as a contract carrier and which required him, in the event of continuance of the business, to qualify as a *common carrier* (which though not mentioned, doubtless would have entailed showing public convenience and necessity). *Observing that compliance with the Michigan statute would have compelled Duke to serve the general public without discrimination and for a reasonable payment, and would have prevented Duke from using his trucks exclusively to perform his contracts,* the Court determined that the Michigan statute constituted a direct and substantial burden upon interstate commerce, and, therefore, was unconstitutional. Speaking of the requirements of the Michigan statute, which were equivalent to those imposed by the *Kentucky Control Law* and the *Kentucky Motor Vehicle Transportation Act* linked therewith, the Court said:

“And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier \* \* \*

“Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of highways. *The police*



*power does not extend so far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the Constitution."* (Italics ours.)

BUCK v. KUYKENDALL (1925),  
267 U. S. 307, 69 L. Ed. 623.

Buck, a citizen of Washington, who desired to operate an automobile bus line over a Federal Aid Highway between Seattle, Wash., and Portland, Ore., applied for and obtained from the State of Oregon the license prescribed by its laws. He then applied to the State of Washington for the prescribed certificate of public convenience and necessity required by its statutes, and was refused, on the ground that adequate transportation facilities already were available. To enjoin interference by Washington officials with the operation of the projected line, Buck brought this suit against Washington's Director of Public Works. In reversing the judgment of the Court below dismissing the bill, this Court held that the State of Washington could not exact a showing of *public convenience and necessity*, because the determination of that question was peculiarly within the province of the National Government, and that the State's attempt to determine that question constituted an interdicted interference with interstate commerce.

A pertinent portion of the opinion, analyzing the nature and effect of the Washington statute, reads:

"Moreover, it determines whether the prohibition shall be applied by resort, through state of-



officials, to a test which is peculiarly within the province of Federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate, which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways.” (Italics ours.)

BUSH & SONS CO. v. MALOY (1925),  
267 U. S. 317, 69 L. Ed. 627.

A Maryland statute prohibited common carriers of freight by motor vehicles from using the state's public highways without a *certificate of convenience and necessity* having been granted by the state Public Service Commission. The Commission, in the exercise of the discretionary powers vested in it, had denied the plaintiff's application for a certificate to do an exclusively interstate business because the Commission concluded *existing carriers' businesses would be harmed by the proposed operation*. Although use of a Federal Aid Highway was not involved, the Court held the case to be indistinguishable from *Buck v. Kuykendall*, *supra*,



and on writ of error to the Maryland Court of Appeals, reversed its judgment which affirmed the trial court's judgment dismissing the bill which sought to enjoin interference by Maryland officials with the use of plaintiff's vehicles upon the highways. The Supreme Court explained that the Maryland statute, and that State's officials' actions thereunder, were unconstitutional—

“\* \* \* because the statute, as construed and applied, *invaded a field reserved by the commerce clause for Federal regulation.*” (Italics ours.)

Thus, *three times in a single year, 1925, and in the absence of such legislation as now is embodied in Motor Carrier Act, 1935*, the Court held that it is incompetent for a state to exact a certificate of convenience and necessity from an interstate motor carrier. Five years later, *and still five years prior to the enactment of Motor Carrier Act, 1935*, in the fourth case,

#### ALLEN v. GALVESTON TRUCK LINE CORP.

(1930), 289 U. S. 708, 77 L. Ed. 1463,

the Court, in affirming the decree appealed from in *Galveston Truck Line Corp. v. Allen*, 2 Fed. Supp. 488, adhered to the rule laid down in its three decisions of 1925.

The Texas Railroad Commission had granted the applicant truck line, again a *contract carrier*, a permit to operate trucks in interstate commerce into and out of Texas, but had *denied applicant a permit to engage in interstate commerce wholly within the State of*



*Texas as a connecting link in interstate commerce*, justifying its denial of the permit on the grounds that the territory sought to be served by the applicant already was adequately served by common carriers, and that grant of the certificate would have been detrimental to the businesses of such operating carriers. For the fourth time this Court held that it is incompetent for the state to saddle upon an interstate motor carrier—and particularly, a contract carrier—the burden of showing public convenience and necessity for its operations, and upon consideration of that factor, or element, to deny an interstate motor carrier the right to pursue its business. The Court accordingly affirmed the decree below, which enjoined the members of the Railroad Commission and other state law enforcement officials from interfering with the plaintiff in the operation of its trucks over the highways of Texas in interstate commerce.

Two of the preceding four cases involved common carriers, and two of them involved contract carriers. Three of the cases were decided in 1925 and one in 1930. Thus, all were decided long before Congress enacted Motor Carrier Act, 1935. Thus, each of the four cases shows regulations and requirements of the character in question to be not matters of mere local concern, but to be matters of National concern, and each of the cases further shows that such refusal of permission to inaugurate, or to continue to engage in, such interstate operations is a direct and substantial interference with interstate commerce, and not a mere in-



direct, remote or incidental interference therewith. There having been no act of Congress occupying the field at the time these four cases were determined, had the Court considered compulsory conversion from contract to common carrier or a requirement of obtention of a certificate of public convenience and necessity to represent only an indirect and incidental burden, and the matters to be only of local concern, the Court would have invoked and followed the doctrine of *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412, and of the distinguishable motor carrier cases earlier mentioned, *ante*, pp. 27-29. The determinations made in the four cases cited show that interferences of the precise character involved in the case at bar are direct and substantial, of National concern, and void even in the absence of congressional action, because of the self-executing character of the Commerce Clause in application to direct and substantial interferences in matters of National concern.

The Control Law essays too much. The cases cited in this section show that the specially constituted Court below erred in its Conclusions of Law to the effect that the Control Law (1) in requiring a Transporter's License for interstate export operations, (2) in specifying compulsory metamorphosis from "contract" to "common" carrier, and (3) in requiring winning of certificate of public convenience and necessity, in application to the plaintiff, and its interstate export business, (a) only remotely and incidentally affects interstate commerce; (b) does not con-



stitute a direct or substantial interference with interstate commerce in a matter of National concern; and (c) that the regulations do not contravene the Commerce Clause (R. 48-62). The cases show, further, that the Court below erred in dissolving the temporary restraining order, in overruling plaintiff's motion for a preliminary injunction, and in dismissing the complaint as amended, and that appellant's assignment of errors in the particulars mentioned, being Assignment of Errors and Statement of Points designated by corresponding symbols, "1," "2," "3," and "4," subparagraphs "a," "b," and "c" (R. 73-75; 79-80) are well taken.

**(E) Acts of Congress Occupy the Field of Regulation, the Control Law Conflicts Therewith, and Is Void.**

The rationale of the four decisions discussed in the preceding section of this brief is such that the Control Law properly would be deemed unconstitutional in the absence of congressional legislation occupying the field of regulation. However, in 1935, subsequent to the decision of those four cases, Congress enacted "*Motor Carrier Act, 1935*" (App. 22), which completely occupies the field and excludes conflicting state regulation of the same subject matter. The Federal Act occupies the entire field of regulation in each and all of the particulars presented in the case at bar. The field thus having been pre-empted by Congressional action, the conflicting state action, represented



by the Control Law, is inhibited, superseded, and rendered void.

Congress expressly declared *Motor Carrier Act, 1935, U. S. C. A., Title 49, Sec. 302*, to have been enacted to develop and preserve a *highway transportation system properly adapted to the needs* (a) of the *Nation's commerce*, and (b) of *National defense*. Congress avowed it to be its policy and purpose by the Act to regulate interstate transportation by motor carriers (App. 22, 23). The Act, U. S. C., Title 49, Sec. 302 b, provides that it shall apply to transportation of "*property*" by motor carriers engaged in interstate commerce, and to the regulation of such transportation, control of which matters is vested in the Interstate Commerce Commission (App. 23), and such control thereby certainly is denied the states. In stating that the Act shall apply to the transportation of "*property*," Congress used a word of the broadest import and connotation. Significant, is the single, chosen word's catholicity. Nothing in the case at bar requires the Court to determine whether the word "*property*," as used in the Act, includes commodities which are not the subjects of legitimate trade and commerce, such as the unsound citrus fruits and decaying animal carcasses involved in *Sligh v. Kirkwood* and *Clason v. Indiana, supra*, but the word "*property*" as used in the Act—with the exceptions enumerated in the Act itself—certainly includes all legitimate subjects of interstate commerce, including intoxicating liquors in export (*ante*, pp. 34-39). The



numerous, detailed *exceptions* of certain operations from the purview of the Act, prescribed by its own terms, are themselves significant. So excepted are: motor vehicles employed solely in transporting school children and teachers to and from school, taxicabs, hotel busses, motor vehicles operated under the supervision of the Secretary of Interior for the purpose of transporting persons in and about the National Parks and National monuments, motor vehicles operated by farmers and used in the transportation of agricultural commodities or supplies, motor vehicles operated by cooperative associations, trolley busses, motor vehicles used in carrying live stock, fish or raw agricultural commodities, motor vehicles used exclusively in the distribution of newspapers, motor vehicles used in the transportation of persons or property incidental to transportation by aircraft, and motor vehicles used in the transportation of passengers or property wholly within a municipality or between contiguous municipalities, and casual operations (*U. S. C., Title 49, Sec. 303, Subsec. 21b; App. 26, 27*). But out of the sweeping grant to the Interstate Commerce Commission of control over motor carriers transporting "property," *Congress carved no exception pertaining to carriers of intoxicating liquors.* The rule, *expressio unius est exclusio alterius*, would seem applicable in the face of these detailed exceptions which do not include mention of transportation of intoxicating liquors in export. Clearly, all "property," all lawful subjects of commerce (with the exceptions prescribed by the Act's own terms) are subject to the Act's pro-



visions, and the field of regulation is completely and exclusively occupied by the Act to the extent indicated.

The Federal Act, *U. S. C., Title 49, Secs. 303, Subsecs. 14-16; 306; 309*, authorizes operations by both common carriers and contract carriers by motor vehicle (App. 25, 28, 29, 31, 32), provides for the issuance of certificates of convenience and necessity for the former (*U. S. C., Title 49, Sec. 307; App. 30*), and for the issuance of permits to the latter (*U. S. C., Title 49, Sec. 309b; App. 31, 32*). Regulation of common carriers and contract carriers alike, is delegated to the Interstate Commerce Commission (*U. S. C. Title 49, Sec. 304; App. 28*).

We previously have invited the Court's attention to the fact that plaintiff has been operating as an interstate contract carrier of property pursuant to its compliance with the provisions of the Motor Carrier Act, 1935, and with the sanction of the Interstate Commerce Commission (*ante*, p. 5). In the face of the broad scope of this Act of Congress, and in view of the fact that the plaintiff has duly qualified to operate thereunder, it would seem clear that it is not competent for the State of Kentucky to forbid plaintiff to continue to engage in its mentioned business as a contract carrier of exports or for Kentucky to impose as conditions for the exercise of that right that plaintiff transform itself into a common carrier and obtain a certificate of convenience and necessity from Kentucky authorities. Nevertheless, the Three Judge Court below has held that Kentucky may do so.



*Motor Carrier Act, 1935*, authorizes contract carriers to transport "property." Whiskey is "property."

The License Cases (Thurlow v. Mass.), 5 How. 504, 12 L. Ed. 256.

"But spirits and *distilled liquors are universally admitted to be* subjects of ownership and *property* and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of *property* exists." (Italics ours.)

No reason appears for giving the word "*property*," as used in *Motor Carrier Act, 1935*, a more restricted meaning than was given it in the Act of Congress involved in *Bowman v. Chicago & N. W. R. R. Co.*, ante, p. 36, and quoted in the opinion therein:

"*Every railroad company* \* \* \* is hereby authorized to carry \* \* \* all passengers, troops, government supplies, mails, freight and *property* on their way from any State to another State, and to receive compensation therefor." (Italics ours.)

The opinion in the *Bowman* case took cognizance of other Federal acts regulating the transportation of *high explosives*, and which acts further expressly provided that their enactment should not be construed to prevent the states from regulating or prohibiting traffic in, or transportation of, explosives between persons or places lying or being within their territorial limits. Speaking of these Acts of Congress, the Court said:

"So far as these regulations made by Congress extend *they are certainly indications of its inten-*



*tion that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself, or by the states in particular cases by the express permission of Congress."* (Italics ours.)

The exception of explosives is analogous to the exceptions provided by Motor Carrier Act, 1935 (*ante*, p. 53).

The intoxicating liquors involved in the *Bowman* case, tendered to the railroad for shipment, and rejected by it, were held to have been "freight and property" within the meaning of those terms as used in the Act of Congress, which it was the railroad's duty to accept and transport. The word "property" used in the same railroad statute was held to include intoxicating liquors in *Adams Express Co. v. Ky.*, 214 U. S. 218, 53 L. Ed. 972, *ante*, p. 36, *infra*, p. 62. Pursuing the reasoning employed in the *Bowman* case and the *Adams Express Co. case*, the intoxicating liquors involved in the case at bar likewise are "property," power to regulate the interstate transportation of which has been reposed by Congress in the Interstate Commerce Commission by the Federal legislation governing interstate motor carriers, subject to an exception with respect to *imports* created by the Webb-Kenyon Act and the 21st Amendment.

Moreover, there is additional Federal legislation, pertaining explicitly to interstate commerce in liquor, impelling to the same conclusion. Like the 21st Amendment, the *Wilson Act*, and the *Webb-Kenyon*



Act (App. 37, 38) concern themselves only with importations into a state contrary to the laws thereof. The *Knox Act*, the *Federal Alcohol Administration Act*, of 1935, and *Liquor Enforcement Act of 1936* (App. 41, 42, 38), however, deal with both imports and exports, as is shown, *infra*, pp. 66, 67, 96, 97. We previously have shown that in the absence of any Federal statute upon the subject, and prior to the adoption of the 21st Amendment, both interstate importation and exportation of liquors were deemed to be within the commerce powers of the Nation, to be free, and not to be subject to state regulation or control. By the enactment of the Federal statutes last mentioned and by the adoption of the 21st Amendment, importation into a state contrary to its laws has been restricted, and the states have been authorized to exercise regulatory powers over imports. Nevertheless, *since and despite these changes in the Federal laws, and with the assent of Congress, the status of exportation in interstate commerce has remained unaltered, except with respect to the labeling and packaging requirements imposed by the Knox Act and Federal Alcohol Administration Act, and provisions for enforcement made by Liquor Enforcement Act of 1936 (infra, pp. 66, 67, 96, 97).* The states remain powerless and impotent to regulate exports of intoxicants in interstate commerce, and it is not needful that Congressional language be found inhibitive of state regulatory action.



SOUTHERN RAILROAD CO. v. REID,  
222 U. S. 424, 56 L. Ed. 257.

A judgment of a North Carolina State Court—which enforced a state statute against an interstate railroad by penalizing it for refusal to accept tender of an interstate shipment—was reversed because the statute was in conflict with the Interstate Commerce Act, and therefore void. The railroad had refused to accept the shipment because at the time the same was tendered no through and joint rates had been established with the Interstate Commerce Commission. In holding the mentioned result followed even though no language inhibiting state action was to be found in the Interstate Commerce Act, the Court said:

“There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. *It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of.*” (Italic ours.)

It is unimportant that Congress has not expressly forbidden the states to attempt to regulate export traffic in intoxicants. Read in conjunction with the Acts of Congress pertaining to interstate traffic in intoxicating liquors, *Motor Carrier Act, 1935*, authorizes an interstate contract carrier by motor vehicle to transport exports of intoxicants, and in that particular the Control Law is in irreconcilable conflict with the Federal legislation, with the inevitable result well illustrated in



PENNSYLVANIA R. R. CO. v. PUBLIC SERVICE  
COMM.,

250 U. S. 566, 63 L. Ed. 1142.

A Pennsylvania statute prescribed a 30-inch platform, guard-rails and steps for the end cars of trains, which specifications conflicted with the regulations of the Post Office Department governing the construction and equipment of mail cars when used as end cars, and conflicted, also, with the Interstate Commerce Commission's specifications for caboose cars, constantly used as end cars, without platforms. Being in conflict with the regulations of both the Post Office Department and the specifications of the Interstate Commerce Commission, the Pennsylvania statute was held void, even though it well may have been regarded as imposing only an incidental and indirect burden on interstate commerce.

So potent is the National Government's power over interstate commerce that *the mere manifestation of congressional purpose is sufficient to nullify a state law inconsistent therewith:*

ERIE R. R. CO. v. NEW YORK,

233 U. S. 671, 58 L. Ed. 1149.

In a state Court of New York the defendant interstate railroad company had been convicted, under a New York statute, of having employed, on November 1, 1907, a railroad telegrapher more than eight hours in a period of twenty-four hours, such excess in hours having been prohibited and denounced by the state's



statute. The defense urged below and in the Supreme Court was that the New York statute was in conflict with the purpose manifested by Congress by the "Hours of Service Act," approved March 4, 1907, which by its terms *was to come into force and effect one year after its passage*, and by which Act, among other things, interstate railroads were authorized to employ railroad telegraphers for nine hours in twenty-four hour periods. *The alleged offense thus had been committed after the enactment of the Federal statute but before it became effective.* The burden imposed by the New York statute probably accurately should be described as only incidental and indirect. Nevertheless, in reversing the judgment of conviction, this Court held the New York statute *invalid* because of the *conflict existing between its terms and the purpose manifested by the Federal statute*, saying:

"The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, *when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist.*" (Italics ours.)

The same rule was applied and a Washington statute held to have been rendered void by the congressional purpose evinced by the "Hours of Service Act" prior to its effective date, in *Northern Pacific R. R. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237.



The Federal sanction and authority accorded Ziff-  
rin, Inc., under and by virtue of its qualification to  
operate under *Motor Carrier Act, 1935*, and the su-  
periority and supremacy of the right so conferred over  
any attempted deprivation or limitation thereof by the  
State of Kentucky, are comparable to the analogous  
rights conferred by the licenses to engage in the coast-  
ing trade presented in *Gibbons v. Ogden*, 9 Wheat. 1,  
6 L. Ed. 23, and *Sinnot v. Davenport*, 22 How. 227, 16  
L. Ed. 243, which license rights the Court held to be  
inviolable as against the antagonistic regulatory acts  
of state legislatures. Juridically, the authority to  
operate in interstate commerce which Ziff-  
rin, Inc., derives under *Motor Carrier Act, 1935*, would appear to  
be identical with the rights to engage in interstate com-  
merce derived by the owners of vessels enrolled and  
licensed, under the Act of Congress, to engage in the  
coasting trade.

Acts of Congress, expressly and by necessary impli-  
cation, say that plaintiff may engage in the business  
of transporting exports of liquor from Kentucky in  
interstate commerce, and that plaintiff may conduct  
that business in its character of contract carrier. It  
consequently is incompetent for the State of Kentucky,  
by the Control Law, to forbid plaintiff to continue to  
engage in that business or to require plaintiff to con-  
vert itself into a common carrier and to show public  
convenience and necessity for its operations as condi-  
tions precedent to continuing so to engage. It is not  
a sufficient answer to say, as did the Court below, that



the Control Law represents an exercise of Kentucky's police power. *Conservation of natural resources* is a proper object for the exercise of the police power, but state statutes, enacted in the purported exercise of that power, which conflict with the commerce powers of the National Government, are unconstitutional (*West v. Kansas Natural Gas Company*, 221 U. S. 229, 55 L. Ed. 716; *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. Ed. 1117, re-affirmed on petition for rehearing, 263 U. S. 350, 67 L. Ed. 1144; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. Ed. 738; *Peoples Natural Gas Co. v. Public Service Comm.*, 270 U. S. 550, 70 L. Ed. 726). The prevention of fraud is a recognized object of the exercise of the police power. However, the police power cannot be exercised to prevent fraud if the statute is in opposition to the commerce powers of the National Government (*Real Silk Hosiery Mills, Inc., v. Portland*, 268 U. S. 325, 69 L. Ed. 982; *Di Santo v. Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524). The prevention of furnishing intoxicating liquors to habitual inebriates is a proper subject for the exercise of the police power, but in 1909 a 1903 Kentucky statute so providing was held invalid in application to quantities of liquor imported from Indiana in interstate commerce by an habitual drunkard, resident of Kentucky (*Adams Express Co. v. Ky.*, 214 U. S. 218, 53 L. Ed. 972), the Court saying: "Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of com-



merce." If prior to the enactment of the Webb-Kenyon Act Kentucky was powerless to prevent the Express Company from delivering Indiana liquors to Kentucky inebriates, then it would seem plain that in 1938 Kentucky was impotent to prevent plaintiff, an Indiana corporation, from transporting Kentucky liquors out of the state, into Indiana and Illinois, and far away from Kentucky's inebriates. Moreover, a regulatory statute enacted in the exercise of the police power, *may be valid in application to intrastate transactions and, nevertheless, invalid when in application to interstate transactions* it comes into conflict with the commerce powers of the National Government. A perfect illustration is afforded by the decisions concerning the 1933 New York Milk Control Act, sustained in its intrastate application, as a measure designed to promote the *public health* by assuring a safe and adequate milk supply (*Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 940), but held unconstitutional in its interstate application because deemed a direct burden on interstate commerce (*Baldwin v. Seelig*, 294 U. S. 511, 79 L. Ed. 1032). The decisions which rendered nugatory the attempts of states to regulate interstate liquor traffic on the ground that the state laws constituted direct interferences with interstate commerce, are of the same pattern and have been discussed. The identical difference which distinguishes *Baldwin v. Seelig* from *Nebbia v. New York* likewise distinguishes *Heyman v. Hays*, *Bowman v. Chicago, Etc., R. R. Co.*, and like cases (*ante*, pp. 36, 37, 55), from the domestic, in-



ternal transaction cases, concerning prohibition of distillation and regulation of retail sales, presented in *The License Cases* (*Thurlow v. Massachusetts*), 5 How. 504; 12 L. Ed. 256; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, and *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346.

Prior to the enactment of *Motor Carrier Act, 1935*, and in lawful control of motor carriers, it was within the competence of the states to make, and within their territorial confines to enforce, reasonable and non-discriminatory regulations pertaining to matters of local concern (as distinguished from matters of National concern) only indirectly and incidentally (and not directly or substantially) affecting interstate commerce (*ante*, pp. 24-29). But *Mich. Pub. Util. Comm. v. Duke*, *Buck v. Kuykendall*, *Bush & Sons Co. v. Maloy*, and *Allen v. Galveston Truck Line Corporation*, *supra*) all decided prior to the enactment of Motor Carrier Act, 1935—Now that even independently of such Congressional action it is incompetent for the states to exclude interstate motor carriers from operation within their borders or to impose upon such carriers laws or regulations constituting substantial burdens upon or direct interferences with their interstate operations, such as conversion of the carrier's business from contract to common carriage, or procurement of certificate of convenience and necessity. Statutory provisions, equivalent to those of the Control Law which prohibit an interstate contract motor carrier from continuing its interstate operations unless it converts



itself into a common carrier and procures a certificate of convenience and necessity, were held unconstitutional prior to, and in the absence of, enactment of Motor Carrier Act, 1935.

However, the plaintiff's position is fortified by the enactment of *Motor Carrier Act, 1935*, by which Congress, in pursuance of the authority vested in it to regulate interstate commerce and to provide for the National Defense, pre-empted the field of permissible regulation. Certainly, at all times subsequent to the enactment of that Act it has not been open to Kentucky to deny to plaintiff the right to conduct its established business of carrying whiskey exports from Kentucky. State regulation, even though it amounts to no more than an incidental and remote interference with interstate commerce, cannot prevail when in conflict with an Act of Congress. Consequently, the regulations embodied in the Control Law must fail even if they incorrectly be regarded as merely incidental and remote interferences, instead of being correctly appraised as the direct and substantial obstructions which they repeatedly have been adjudged to be.

After erroneously stating that Congress—

“\* \* \* has expressly avoided enacting legislation dealing with the shipping of liquor out of a state as is the case at bar” (R. 55)

and after thrice reiterating the substance of that statement (R. 57, 59), and despite the fact that nothing in the record shows the number of contract car-



riers by motor vehicle operating in Kentucky, and notwithstanding that the matter of the number of such carriers so operating, if pertinent (and it is not), would be one for establishment by both allegation and proof, and is not a matter of which a Court properly may take judicial notice, the Opinion continues:

*"There are hundreds of independent trucks operating in Kentucky under a contract carrier's license. They have no schedule, no fixed route, and no definite termini. It would be an impossibility to determine the quantity or destination, whether within or without the state of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor"* (R. 60, 61, and errata page). (Italics ours.)

This statement of the trial Court not only draws on matters *dehors* the record—and which possibly could not be substantiated by proof—of which excursion plaintiff well may complain, but it also entirely disregards, and in fact contradicts, the provisions of the *Knox Act, Criminal Code, Sec. 240* (App. 41), which denounce as a criminal and punishable offense for any person knowingly to ship, or cause to be shipped, from one state into any other state any package containing intoxicating liquors fit for use for beverage purposes—

*"\* \* \* unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein."* (Italics ours.)



The trial Court's statement similarly omits to take cognizance of the elaborate packaging and labeling requirements imposed in 1935 by *Federal Alcohol Administration Act* (App. 42).

*Liquor Enforcement Act of 1936, U. S. C., Title 27, Sec. 225* (App. 40), charges the Secretary of the Treasury, and his nominees, with the duty of enforcing the aforementioned provisions of the *Knox Act, Criminal Code, Sec. 240*. Thus Congress has provided that the Secretary of the Treasury and personnel selected to administer *Federal Alcohol Administration Act*, and not the Alcoholic Beverage Control Board of Kentucky, shall see to it that beverage liquors' containers, in export in interstate commerce, shall show the consignments' quantities and destinations, and Federal legislation already requires the specific disclosure the District Court below deemed needful, but which it erroneously considered was not required by Federal statutes and would not exist unless required by Kentucky regulation.

In view of *Motor Carrier Act, 1935, Knox Act, Federal Alcohol Administration Act* and *Liquor Enforcement Act of 1936*, we contend that the District Court below erred in making, and in applying, its Conclusions of Law—

(a) That Congress has not legislated with respect to the export transportation of intoxicants in interstate commerce by contract carriers by motor vehicle for hire, and



(b) That National legislation governing and controlling interstate exportation and exports of intoxicants is lacking,  
 which Conclusions plaintiff has assigned as error (Assignment of Errors, and Statement of Points, indicated "4," subpars. "d" and "e" (R. 75, 80).

**(F) In Assuming to Require Plaintiff to Convert Itself into a Common Carrier, the Control Law Deprives Plaintiff of Its Property Without Due Process of Law.**

We previously have shown (*ante*, pp. 9, 10, 40) that the Control Law assumes to require plaintiff to hold a Certificate of Convenience and Necessity in order to be eligible to receive a Transporter's License, and that in order to secure the indispensable Certificate of Convenience and Necessity—by the conjugate provisions of the Control Law and the Motor Vehicle Transportation Act.—plaintiff must resolve itself into a common carrier. In three motor carrier cases this Court has held that such prescript of transmutation from contract carrier to common carrier is a taking of property without due process. The rule was first laid down in

**MICHIGAN PUBLIC UTIL. COMM. v. DUKE,**  
 266 U. S. 570, 69 L. Ed. 445,

the facts in which have been stated earlier (*ante*, p. 44). With respect to *due process*, the Court said, in part:

"Moreover, it is beyond the power of the state by legislative fiat to convert property used exclu-



*sively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment."* (Italics ours.)

FROST TRUCKING CO. v. RAILROAD  
COMMISSION,

271 U. S. 583, 70 L. Ed. 1101.

A 1919 amendment to the 1917 California Truck Transportation Act provided that no motor carrier should operate for compensation over the highways of the state *without first having secured from the Railroad Commission a certificate of public convenience and necessity.* The amendment assumed to place contract carriers on exactly the same footing as common carriers. The plaintiffs in error were contract carriers engaged, under a single private contract, in transporting citrus fruits over the public highways for compensation. They were brought before the Railroad Commission charged with having violated the Act as amended, in that they had not secured from the Commission the required certificate of public convenience and necessity. The Commission directed the plaintiffs in error to suspend their operations under their contract until they should have secured a certificate of public convenience and necessity, and the Commission's order was upheld by judgment of the State Supreme Court. Thereupon the carrier sought, through



writ of error, to review the judgment of the California Court, which prohibited them from engaging in their mentioned business. So far as the opinion shows, *interstate commerce was not involved*. Certainly, no consideration was given to the case otherwise than under the Fourteenth Amendment.

The Court held the case indistinguishable in principle from *Mich. Pub. Util. Comm. v. Duke, supra*, and in holding that the California Act deprived the carrier of its property without due process of law, and in reversing the judgment of the California Court, which had upheld the Railroad Commission's order to cease and desist, this Court said:

“ \* \* \* In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but *it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission*. The certificate of public convenience, required by §5, is exacted of a common carrier and is purely incidental to that status. The requirement does not apply to private carrier *qua* private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist.

“That, consistently with the due process clause of the 14th Amendment, a private carrier cannot



*be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in Michigan Pub. Utilities Commission v. Duke, \* \* \**

*"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.*

*"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution,*



but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. *It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.*" (Itakes ours.)

On July 1, 1938, Ziffrin, Inc., like the Frost Trucking Co. almost 20 years earlier, was confronted by the choice described by the Court as that between Scylla and Charybdis.

SMITH v. CAHOON,  
283 U. S. 553, 75 L. Ed. 1264.

This case presented a similar situation, and worked out to the same result. The carrier was a private, or contract carrier, for hire, engaged exclusively in intrastate business in Florida. The Florida statutes regulating automobile transportation companies undertook to place contract carriers and common carriers on a like footing, and required both types of carriers to obtain



*certificates of public convenience and necessity, to submit to regulation of their services, to accept a prescribed method of keeping accounts, and to open their schedules of rates to the public. The Court held the Act unconstitutional in application to the contract carrier, saying:*

*"All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state." (Italics ours.)*

The only way in which Ziffirin could secure the requisite Transporter's License was for Ziffirin radically to change the essential nature of its business, to remould itself into a common carrier, and to assume the added burdens, obligations and liabilities imposed by law upon a carrier which has so dedicated its business to public service. The rule established by the three cases last cited is that the attempted extortion by a state of such change in business phase as a statutory *quid pro quo* for the enjoyment of the right to engage in the business of a motor carrier is a violation of the carrier's constitutional rights. Under that rule



the Court below erred in its tacit—but necessarily implied—Conclusion of Law that it is competent for the General Assembly of Kentucky to require plaintiff, by way of conditions precedent to enjoying the privilege of continuing in business, to transform its business from that of a contract carrier into that of a common carrier; to dedicate its property and activities to service of the public indiscriminately, and necessarily to relinquish its existing, hard-won and valuable contracts; to renounce and forfeit—at least to jeopardize—its status as a contract carrier in other states and before the Interstate Commerce Commission; to assume the burdens and liabilities of a common carrier; to establish the existence of public convenience and necessity for its operations; and to submit to regulation and modification, by Kentucky officials, of its services, and charges therefor. The settled rule is that a state's demand that a contract carrier surrender so much, or quit business, constitutes a proscribed taking of the carrier's property without due process of law. In such case it is the expression of an untenable viewpoint to say that the Control Law represents a valid and reasonable regulation within the orbit of the proper exercise of the police power (R. 52, 62). The three cases last cited show, we believe, that the Control Law is palpably arbitrary and patently in excess of recognized state legislative power, that it assumes to take plaintiff's property without due process, that the appellant's Assignment of Errors and Statement of Points indicated "4," sub-pars. "j" and "k" (R. 75, 76, 81, 82), are well grounded, and that reversible error was



committed below in holding the Control Law constitutional and in dismissing the bill.

**(G) The Control Law's Arbitrary Classification Denies Plaintiff the Equal Protection of the Laws.**

Admittedly, the 21st Amendment gives the states broad regulatory powers over *imports* of intoxicants (*State Board of Equalization v. Young's Market Co.*, and other cases *ante*, p. 26). In the case at bar, however, the traffic is in *exports* exclusively, to which the 21st Amendment has no relevancy, and the classification presented by the Control Law is unreasonable and arbitrary upon its face. The difference between an interstate *contract* motor carrier, declared by the Control Law to be *ineligible* to receive the liquor Transporter's License, on the one hand, and an interstate *common* motor carrier, declared *eligible* to receive such license, on the other, is that the contract carrier conducts its business with particular customers pursuant to special contracts, copies of which it must file with the Interstate Commerce Commission, whereas the common carrier holds itself out to be willing to carry for the general public, at rates prescribed by that Commission and to transport the freight under obligations fixed by the common law and applicable statutes. This difference, as charged in the bill as amended (R. 25, 26), does not justify denying to contract carriers by motor vehicle the right to carry export whiskies in interstate commerce, which privilege the Control Law accords to common carriers by motor vehicle, because



the distinction bears no reasonable relationship to any supposed subject or object of the Control Law in the proper regulation of the liquor traffic.

Inasmuch as the 21st Amendment is ineffective and inoperative with respect to exports, and because of the facts that with respect to exports the *Motor Carrier Act, 1935* and the *Kear Act, Federal Alcohol Administration Act* and *Liquor Enforcement Act of 1936* fully occupy the field, and the Commerce Clause itself is self-executing in matters of the character under consideration (*ante*, pp. 34; 39-68), Kentucky is powerless to regulate the transportation of exports of liquors from Kentucky in interstate commerce, even if the same be borne by common carriers. Kentucky is impotent to control interstate export cargoes of liquors or to prevent their diversion to improper channels or to unauthorized persons, whether the carrier be a common or a contract carrier. Therefore, the assumed classification has no tendency to prevent such diversions or abuses. Furthermore, the classification has no tendency to assure that liquors will be transported by reliable and honest carriers who would not engage in or permit such abuses or diversions, for, obviously, the operating personnel of a motor carrier may be honest and trustworthy, or dishonest and untrustworthy, but whether they be of one or the other character is not determined, influenced or affected by reason of the carrier being a contract carrier, on the one hand, or a common carrier, on the other. Moreover, the Kentucky Legislature and the Control Board manifestly did not genuinely regard the dangers of such diversion or other



improper actions in the conduct of the carriers' liquor transportation business to be actually grave. This is shown by the penal amount of the bond required of the holder of a Transporter's License fixed at a paltry \$1,000.00 by the Control Board's Regulations, made pursuant to authorization of the Control Law, Sec. 37 (R. 19). In other words, the Control Law, as enacted and administered, asks nominal security of the common carrier, and will not permit a contract carrier to continue business on any terms. Interesting too, and of weighty significance, is the fact that the Control Law contains not a single provision looking to the policing or surveillance of the business activities of holders of Transporter's Licenses.

We contend that the attempted distinction is utterly artificial and possessed of no reasonable relation to the realities involved, that when Kentucky's General Assembly undertook to debar contract carriers from the interstate whiskey export business it exceeded all permissible latitude in classification.

In

**COTTING v. GODDARD AND KANSAS CITY  
STOCKYARDS CO.,**

483 U. S. 79, 46 L. Ed. 92,

the Court held a Kansas statute, which undertook to regulate the charges made for their services by stockyards doing a large volume of business, but which omitted regulation of the service charges of stockyards doing a small volume of business, to be repugnant to the Equal Protection Clause. The Court's view was that



for the purpose of regulating charges for services it was not permissible to classify the businesses according to their sizes, and that small businesses could not be granted preferential treatment over large businesses. Much more objectionable—it would seem to be—is a classification which accords preferential treatment to large enterprises as compared with small enterprises, which is the precise situation involved in the case at bar, the large and strong common carriers by motor vehicle being allowed by the Control Law to engage in the business, and the relatively small and weak contract carriers being prohibited from engaging therein. Well might the Court say of the classification here presented, as it vigorously did say of the classification before it in *Cotting v. Goddard, supra*, that the business of Ziffrin, Inc., is not to be made the object “*of the legislative scalping knife.*”

The “*classification*” presented upon this appeal would seem to be fatally bad within the rule and doctrine of

CONNOLLY v. UNION SEWER PIPE CO. (1902),  
184 U. S. 540, 46 L. Ed. 679.

The Sewer Pipe Company brought suit against defendant, Connolly, on two promissory notes which he had given plaintiff in part payment of pipe purchased from it. Connolly attempted to defend on the ground, and averred, that the plaintiff had violated an Illinois statute prohibiting combinations of capital and skill, and acts by two or more persons, for the purpose of creating restrictions in trade, limiting production, con-



trolling the prices of commodities or to prevent competition in manufacture, transportation, sale or purchase of commodities. The 9th section of the Illinois statute provided that the Act's provisions should not be applicable to agricultural products or to live stock while in the hands of the producers or raisers: its 10th section provided that any purchaser of any commodity from any person transacting business contrary to the provisions of the Act should not be liable for the price or payment for such commodity.

After having heard the case twice argued, this Court affirmed the judgment below for plaintiff, holding that defendant's plea of exoneration under the 10th section of the statute did not present a defense, because, by reason of its discriminatory 9th section the statute was in violation of the Equal Protection Clause. The Court held that the exemption contained in the 9th section represented arbitrary classification which rendered the 10th section void with respect to persons not comprehended within the categories of the 9th section.

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." (Italics ours.)



All to the end, stated in *Cotting v. Goddard* (*ante*, p. 77),

"It has been wisely and aptly said that *this is a government of laws, and not of men*; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them." (Italics ours.)

We believe the principles of the foregoing cases show that the Court below erred in ruling in its Conclusions of Law that the Control Law's provisions rendering common carriers by motor vehicle eligible, and contract motor carriers ineligible, to obtain the liquor Transporter's License, are valid (R. 62). Upon well settled principles the purported classification is nothing more than arbitrary selection and the Control Law properly should be deemed repugnant to the Equal Protection Clause (Assignment of Errors and Statement of Points, designated, "1," "2," "3," and "4," subparags. "k" and "l," R. 73, 76, 79, 80, 82).

**(H) The Control Law's Extreme Penalties Contravene Both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.**

In addition to contravening the Equal Protection Clause by arbitrarily selecting common carriers by motor vehicle as the only motor carriers eligible for the liquor Transporter's License, the Control Law also is repugnant to that same clause—and to the Due Process Clause, as well—in that for violation of its terms



and provisions the Control Law provides penalties so severe and extravagant as to preclude resort to the courts in ordinary course to secure a judicial review of the validity of the Control Law and of the penalties thereby provided.

The Control Law affords the affected motor carrier no adequate opportunity in an appropriate judicial proceeding safely to test the validity of the Law or the validity of the prescribed penalties. The Control Law makes no provision for an injunction pending such test by judicial review, and makes no provision to relieve a motor carrier conducting the test from liability for penalties incurred during the pendency of the test proceeding.

*COTTING v. GODDARD* (ante, p. 77), concerned itself not only with classification, but also with the question whether the statutory penalties there involved did not of their own force deny the Stockyards Company the equal protection of the laws. Compared with the savage penalties provided by the Kentucky Control Law, the penalties fixed by the Kansas statute were comparatively mild. The Kansas statute's maximum penalties were provided for fourth and subsequent offenses, and consisted in a fine of \$1,000.00 and six months' jail sentence—penalties not even 10% so severe as those provided by the Control Law. Nevertheless, the Court inclined to the view that the Kansas penalties were so severe as to constitute a denial of equal protection, saying:

*"In this feature of the case we are brought face to face with a question which legislation of other*



*states is presenting.* Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? \* \* \*

\* \* \* But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." (Italics ours.)

Later, in

*Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714, extreme penalties again were presented. The Court cited *Cotting v. Goddard*, *supra*, with approval, and quoted liberally from the opinion therein. In the *Young Case* a Minnesota statute, prescribing penalties for violation by railroads of prescribed maximum freight and passenger rates, was held unconstitutional because of the severity of the penalties. The Court's view was that, in practical operation and affect, the severity of the penalties prevented resort to the courts to determine the validity of the rates themselves, and therefore denied the carrier the equal protection of the laws.



The Kentucky *Control Law*—for an act of transgression which, after all, is only *malum prohibitum*—provides a maximum penalty of \$10,000.00 fine and ten years' imprisonment. The Minnesota statute's maximum penalties were only 50% so stringent—having been a \$5,000.00 fine and 5 years' imprisonment.

Speaking of the Minnesota penalties, and holding the Minnesota statute unconstitutional *on its face* because of the provision of those lesser penalties, the Court said:

"It would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs, except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. *The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company.* \* \* \*

"\* \* \* We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the



*validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."* (Italics ours.)

MISSOURI PAC. R. R. CO. v. TUCKER,  
230 U. S. 340, 57 L. Ed. 1507,

held invalid a statute providing for liquidated damages of \$500.00 to be paid by a railroad which exceeded the statutory tariff on shipments of oil in barrels, and which omitted provision for a hearing in advance to determine the validity of the statutory tariff rate, the Court taking the view that the carrier's opportunity to make defense, at the risk of having to pay what was regarded as an enormous penalty, was merely illusory.

SOUTHWESTERN TEL. & TEL. CO.  
v. DANAHER,  
238 U. S. 482, 59 L. Ed. 1419.

The Court here reversed a judgment enforcing a statutory penalty imposed at the rate of \$100.00 per day, aggregating \$6,300.00, against a telephone company because of its impartial enforcement against one of its patrons of a regulation discontinuing service to any patron in arrears for past service, on the ground that the penalties took the Company's property without due process of law.

OKLAHOMA OPERATING CO. v. LOVE,  
252 U. S. 331, 64 L. Ed. 596.

An Oklahoma statute empowered that state's Corporation Commission make orders prescribing rates



charged by public service trades, prescribed a \$500.00 penalty for disobedience of orders so made, made each day's continuance of the refusal a separate offense; judicial review of such a rate order was afforded only by interposing defense to contempt proceedings based on violation. The Court held the plaintiff laundry company to be entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties, saying:

"Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements \* \* \*."

OKLAHOMA GIN CO. v. OKLAHOMA,  
252 U. S. 339, 64 L. Ed. 600,

involved the same Oklahoma statute in application to a cotton ginning company. The penalties again were held void.

"\* \* \* the provision concerning penalties for disobedience to an order of the Commission was void because it deprived the company of the opportunity of a judicial review."

NATURAL GAS PIPE LINE CO. v. SLATTERY,  
302 U. S. 300, 82 L. Ed. 276.

Because it had not exhausted its administrative remedies before the Utilities Commission of Illinois, the appellant was denied an interlocutory injunction restraining the Commission's order directing appellant to open its books and records for inspection and



to furnish statistical data. The Illinois statute imposed penalties of from \$500.00 to \$2,000.00 a day for failure to comply with such orders. However, in passing, and speaking of these penalties and *what would have been the situation had the appellant, without avail, attempted to secure relief by pursuit of the administrative remedies*, the Court said:

"As the act imposes penalties of from \$500.00 to \$2,000.00 a day for failure to comply with the order, any application of the statute subjecting appellants to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, *Ex parte Young*, 209 U. S. 123 \* \* \*."

Sharply to be contrasted with the foregoing are the cases in which severe penalties have been sustained, but in which the statutes, imposing the penalties, *afforded opportunity for a judicial review by a suit in equity* " \* \* \* during the pendency of which the operation of the penalty provision could have been suspended by injunction" (*St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U. S. 63, 64 L. Ed. 139, penalty, — \$300.00, costs and attorneys' fee; and also, *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. 405, maximum penalty, \$5,000.00 per day).

No adequate or sufficient provision for judicial review is made by the Control Law in a situation such as exists in the case at bar.



The law does not require the doing of a vain thing. Admittedly, appellant being a contract carrier, the Director of the Division of Motor Transportation did not err in declining to grant plaintiff a common carrier's certificate, which is a certificate of public convenience and necessity which may be issued only to motor carriers engaged in the business of common carriage. It would have been nothing short of folly for plaintiff to have appealed from the decision of the Director of the Division of Motor Transportation to the Franklin Circuit Court and thence to the Court of Appeals of Kentucky by pursuing the statutory appeals provided by the Kentucky Motor Vehicle Transportation Act (Ky. Stats., Sec. 2739j, Subsecs. 86-88; App. 19, 20). Affirmance of the Director's correct decision could have been the only result of such appeal. Similarly, inasmuch as plaintiff had been denied the requisite common carrier's certificate, it would have been frivolous and useless for the plaintiff to have appealed from the decision of the Alcoholic Beverage Control Board and of the Commissioner of Revenue denying plaintiff a liquor Transporter's License (a) because none of the enumerated statutory grounds of appeal provided by the *Control Law, Sec. 49*, existed (App. 6-8); (b) inasmuch as plaintiff upon appeal would have been confined to the grounds enumerated in the statute conferring the right of appeal, the issue of unconstitutionality of the Control Law could not have been presented upon such appeal, such challenge not being one of the enumerated statutory grounds of appeal; and



(c) during the pendency of such futile appeals in both the Franklin Circuit Court and in the Court of Appeals of Kentucky the appellant could not have obtained the benefit and protection of an injunction *pendente lite*.

The Control Law outlines the grounds of the statutory appeal and the procedure thereon. It not only fails to provide for the award of an injunction pending the appeal under the circumstances which existed in this case, but by clear implication the statute negatives the jurisdiction of the Kentucky Courts to award such injunction. The situation of an applicant for a license whose application is denied by the Control Board certainly is not superior to that of a licensee whose license has been revoked or suspended by an order of the Control Board. With respect to the latter the *Control Law* provides, in the concluding paragraph of *Sec. 49, Ky. Stats., Sec. 2554b-147* (App. 6-8), that in the event of such revocation or suspension the licensee at once shall suspend all business and other operations authorized by his license, and that even though he may appeal from the order of revocation or suspension to the Franklin Circuit Court, *no Court shall have authority to enjoin the operation of the order of revocation or suspension pending the appeal*. It provides further that during the pendency of the appeal in the Court of Appeals of Kentucky, neither that Court, nor any other Court, shall have authority to issue an injunction to suspend the operation of the Franklin Circuit Court's judgment upholding the Board's order of



suspension or revocation. Both by omission to provide for an injunction, and by express prohibition of injunction in a somewhat analogous situation, the Control Law shows that had Ziffrin, Inc., appealed from the Control Board's order denying it a liquor Transporter's License, during the prosecution of such appeal the appellant would have been without the protection of an injunction and unable to do business, with the necessary consequence that its contracts would have been lost and its business would have been destroyed.

Furthermore, there is no provision in the Control Law to the effect that its prescribed penalties shall not be imposed for transportation activities engaged in during the pendency of the appeals referred to. The Control Law affords no immunity to the unlicensed contract carrier, which, having been denied a Transporter's License by the Control Board, appeals, and continues to transact its business pending a determination of the statutory appeal.

It is a matter of common knowledge that due to a congested docket more than a year elapses from the docketing of an appeal in the Court of Appeals of Kentucky until that appeal is decided. If by advancement on the dockets, the supposititious statutory appellate proceeding in the Franklin Circuit Court and in the Court of Appeals of Kentucky could have been brought to a final determination in a well-nigh unprecedented period of ninety days, and if Ziffrin, Inc., had engaged in but one transaction of unlicensed transportation on each of those days, appellant, never-



# MICRO CARD

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theless, would have rendered itself liable to maximum penalties of \$895,000.00, would have rendered each of its responsible officers and participant-employees subject to fines in like amount, and to imprisonment for 895 years,—if their terms had been adjudged to run consecutively, and not concurrently.

The Control Law's provisions for judicial review, such as they are, in failing to provide for pre-determination of validity, for injunction or exemption from penalties during the pendency of the appeal, manifestly are inadequate to save the excessive penalties from conflict with the Fourteenth Amendment. The District Court below erred in ruling to the contrary, and its rulings in that particular have been assigned as error (Assignment of Errors and Statement of Points, "1," "2," "3," and "4," Subparag. "1"; R. 73, 76, 79, 80, 82).

**(I) The Court Below Committed Additional Errors With Respect to Making Conclusions of Law and Acting Thereon.**

The judgment below is based upon, and attributable to, what we conceive to be entirely erroneous conceptions of fundamental constitutional principles. The District Court's concepts are evidenced by its stated Conclusions of Law, a number of which previously have been discussed. There remain, however, five important Conclusions of Law, avowedly made the bases and grounds of the District Court's decision, some of which Conclusions, *if correct*, would justify the entry



of the judgment appealed from. However, if our reading of the authorities is correct, then each of these remaining Conclusions is entirely erroneous. We, therefore, deem it important to examine the remaining Conclusions.

1. *Supposed Inability to Penetrate Legislative Intent to Stifle Competition.*

The first of these remaining Conclusions (but one which is not necessarily determinative of the questions involved) states that the Court is powerless to say that the Control Law shows on its face a legislative intent and design to give common carriers a competitive advantage over contract carriers, and to discriminate against and to exclude the latter from transacting the business in question (R. 58), and the making thereof has been assigned as error (Assign. of Errors and Statement of Points, identified, "4," subparag. "m," R. 76, 82). In *Buck v. Kuykendall*, and in *Frost Trucking Company v. Railroad Commission* (ante, p. 46, 69), the Court took a different view of the matter, examined the statutes involved, and determined that they represented nugatory attempts to prefer certain motor carriers to other motor carriers and to prevent and limit competition. In the *Buck* case the Court said of the statute:

*"Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom*



the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner." (Italics ours.)

Again, in the *Frost Trucking Co. case*, involving a contract carrier:

"It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. *Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.* Protection or conservation of the highways is not involved." (Italics ours.)

It thus sufficiently appears that the District Court below had plenary power to penetrate the sham and pretense of the Control Law; to take cognizance of the transparent design of the Kentucky General Assembly to prefer common carriers to contract carriers in the transportation of whiskey in interstate commerce and to make a gift to the former of the latter's business, that the Court below was possessed of ample inherent power to denounce that attempt as spoliation by legislative fiat. We believe the failure of the specially constituted Court so to do was error, and one which now well might be rectified.



2. *Congress has not Invited States to Regulate the Business in Question.*

We heretofore have shown that the District Court below erred in its view that there is a lack of National legislative control over motor carriers engaged in transporting exports of intoxicants in interstate commerce (*ante*, p. 51-68). The Court below erred further in its Conclusion of Law that the supposed lack of National legislative control is tantamount to a deliberate and considered *invitation by Congress to the several states* themselves to control the interstate traffic in exportation of intoxicants (R. 57). The Court below made its last mentioned Conclusion a ground of its decision dismissing the bill (R. 67). Appellant has assigned error with respect to this most material Conclusion (Assign. of Error, and Statement, designated, "4," subparag. "f"; R. 75, 81).

Were there, in fact, an omission of Congressional action, that omission would not be deemed an invitation to the states to embark upon regulatory adventures of their own, but under recognized rules of interpretation such omission would be deemed to manifest Congressional intent that the traffic should be free and untrammelled. This result would flow from the self-executing character of the Commerce Clause in application to the direct and substantial interferences with interstate commerce in matters of National concern, admitting of and requiring uniformity of regulation, herein presented.



The omission of Congress in the *Wilson Act*, *Webb-Kenyon Act*, *Knox Act*, *Motor Carrier Act, 1935*, *Federal Alcohol Administration Act*, and *Liquor Enforcement Act of 1936*, to say whether the states shall, or shall not, have power to regulate exports of intoxicants by motor carriers is not properly to be deemed an invitation to the states to exercise regulatory powers over such exportations—which was the erroneous view taken by the District Court below—but is to be deemed to be a manifestation of the will and purpose of Congress that such export traffic shall remain free and untrammelled, except for the regulations imposed by Congress itself, and that uniformity—though it be the uniformity attained by *governmental non-action*—was, and is, necessary to preserve equality of opportunity and of treatment among the various communities concerned. The rule/referred to has been stated and applied in numerous cases.

WELTON v. STATE OF MISSOURI,  
91 U. S. 275, 23 L. Ed. 347.

In disposing of the contention that the state act, prescribing a license tax, should be upheld because Congress had not occupied the field by legislation of its own, the Court said:

“The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. *Its inaction* on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that in-



*terstate commerce shall be free and untrammelled.*"  
(Italics ours.)

WILKERSON v. RAHRER,  
140 U. S. 545, 35 L. Ed. 572.

"The power of Congress to regulate commerce among the several states, when the subjects of that power are *national* in their nature, is also *exclusive*. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, *it was left free except as Congress might impose restraint*. Therefore, *it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.*" (Italics ours.)

BRENNAN v. CITY OF TITUSVILLE,  
153 U. S. 289, 38 L. Ed. 719.

"\* \* \* but we think it must be considered, in view of a long line of decisions, that *it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.*" (Italics ours.)

MISSOURI v. KANSAS NATURAL GAS CO.,  
265 U. S. 298, 68 L. Ed. 1027,

presented the question whether it was competent for the state to regulate the gas company's business of transporting natural gas from one state to another for



sale, which turned upon the question whether that business properly was to be regarded as interstate commerce, and as such, free from state interference in the absence of Federal legislation.

*"But the commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce. \* \* \**

*"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. \* \* \**

*"The transportation, sale, and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national—admitting of and requiring uniformity of regulation. Such uniformity, even though it be uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned." (Italics ours.)*

It is not as though Congress never had directed its attention to the matter of interstate exports of intoxicants. To a limited extent Congress has exercised control of the export traffic. The *Knox Act* (App. 41), renders it a criminal offense, punishable by substantial fine or one year's imprisonment, or both, to ship, or to cause to be shipped, from one state to another state



any package containing alcoholic liquors fit for beverage purposes unless the package be so *labeled* on the outside cover as plainly to show the name of the consignee and the nature and quantity of the contents. *Federal Alcohol Administration Act* (App. 42), contains similar provisions. *This far Congress has gone with respect to exports, and its omission to go farther indicates that Congress did not deem further regulation of exportation needful or advisable.* The case at bar is not one of *circumscribed Congressional regulation* in a limited field, in which situation the state is deemed uninhibited to impose its regulations in the unoccupied remainder of the general field, so long as such state regulations pertain only to matters of *local concern* and only *incidentally* and indirectly affect or burden interstate commerce, which distinguishable situation is well typified by *Atchison, T. & S. F. R. R. Co. v. R. R. Commission*, 283 U. S. 380, 75 L. Ed. 1128. With respect to matters which in their essential nature admit of and require uniformity of regulation throughout the length and breadth of the land, Congress has legislated with respect to the *importation* of intoxicants repeatedly, and in great detail, but has seen fit to omit to legislate with respect to *exportation* of intoxicants—packaging and labeling, under the Knox and *Federal Alcohol Administration Acts*, excepted. The inference authorized by the decisions is that both *by action and inaction* Congress has indicated that it intended—packaging and labeling requirements excepted—that nation-wide interstate commerce in the exporta-



tion of intoxicants should be free and untrammelled, and that it should not be subjected to state regulation.

In concluding, as matters of law, (a) that there is a "conspicuous" lack of Congressional action, and (b) that such supposed absence of Federal legislation constitutes an invitation to the states to exercise their regulatory powers, the Court below heaped one error upon another.

### 3. *Commencement of Interstate Commerce.*

The District Court below further stated among its Conclusion of Law that the cargoes of liquors—delivered by the sellers to the plaintiff in Jefferson County, Kentucky, for direct, immediate, uninterrupted and continuous transportation from the consignor-sellers to the consignee-buyers at the latter's places of residence and domicile situated in Indianapolis, Chicago and other places north of the Ohio River—being wholly within the territorial boundaries of Kentucky, are not yet in interstate commerce (R. 59). Assignment of Errors and Statement of Points, identified, "4," subparag. "g," (R. 75, 81) are directed to this Conclusion of Law, which is inconsistent with cardinal principles. The Control Law assumes to denounce as a criminal offense, punishable by heavy penalties, acceptance by plaintiff, in Kentucky, from vendor-consignors there engaged in business, of consignments of whiskies sold to residents of Indianapolis and Chicago, under contracts calling for the delivery of the whiskies to the purchasers at their places of residence and which consignments are delivered to



the plaintiff in Kentucky, intended, consigned and destined for immediate, direct, continuous and uninterrupted carriage to the consignee-purchasers at their places of residence and business location. (*Ante*, pp. 6-8). Yet, it is precisely at the moment of delivery of the consignment to the carrier that the commerce acquires its interstate character and the protection of the Commerce Clause. It is well settled that interstate commerce commences when the goods start upon their journey destined for delivery in another state, or, upon their *delivery to a carrier* for such transportation.

### THE DANIEL BALL v. U. S.,

10 Wall. 557, 19 L. Ed. 999.

The vessel's operations were confined within the territorial limits of a single state, Michigan. Nevertheless, it was held that the commerce conducted by her was interstate the moment she started to move articles destined for ultimate delivery—by the aid of a connecting carrier—to another state.

“So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for *whenever a commodity has begun to move as an article of trade from one state to another, com-*



*merce in that commodity between the states has commenced.*" (Italics ours.)

TEXAS, ETC., R. R. CO. v. SABINE TRAM CO.,  
227 U. S. 111, 57 L. Ed. 442.

"We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce, and decided it to be when the goods have actually started for their destination in another state or to a foreign country, *or delivered to a carrier for transportation.*" (Italics ours.)

Defendants contended below, and the Court below took the view, that the Kentucky Control Law operates before plaintiff's cargoes acquire immunity under the Commerce Clause, but the identical contention was completely answered in—

LEMKE v. FARMER'S GRAIN CO.,  
258 U. S. 50, 66 L. Ed. 458.

"Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce." (Italics ours.)

Other cases showing that plaintiff's cargoes are to be deemed in interstate commerce and entitled to the protection of the Commerce Clause are: *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715; *Southern P. Term. Co. v. Interstate Commerce Comm.*, 219 U. S. 498, 55 L. Ed. 310; *Railroad Comm. v. Texas, Etc., R. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215; *I. C. R. R. Co. v. DeFuentes*,



236 U. S. 157, 59 L. Ed. 517; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

Plaintiff's cargoes of export liquors—intended, designed and consigned, as they are, for immediate, direct, uninterrupted and continuous transportation to destinations in other states for delivery to purchasers there residing and doing business—gain sanctuary the moment plaintiff receives the same for such transportation. We, therefore, contend that the Court below committed fundamental and prejudicial error in rendering its judgment, avowedly based upon its Conclusion of Law that plaintiff's cargoes are not to be deemed in interstate commerce and, consequently, are not entitled to the protection of the Commerce Clause.

#### 4. *Greater Power Including Lesser—Fallacious.*

Plaintiff also has assigned as error, *Assignment of Errors and Statement of Points* identified as "4," sub-parag. "h" (R. 75, 81), the Court's Conclusion of Law, by the Court made a ground of its decision (R. 60), that inasmuch as it is competent for a state to prohibit the manufacture of intoxicants, and inasmuch as the greater power includes the lesser, the state may permit manufacture conditionally, and it is competent for the state to control the manufactured product, including power to control the transportation thereof in exportation from such state to a sister state in commerce among the several states.

The error in this Conclusion is attributable to the not uncommon fallacy of transfer of authority—bodily transferring, from the world of physical things and



physical laws, a principle there valid, to the inhospitable foreign domain of juridical concepts, governed by quite different laws, where the transplanted principle lacks validity. The error is attributable to the fallacy inherent in the major premise's assumption that the facts present a situation of a comprehensive, collective, "greater" and a like and included "lesser." Admittedly, it is within the power of a state to prevent importation of liquors and to prohibit manufacture of intoxicants within its borders. If a state does so, the commodity does not come into *existence* within its confines. So long as no liquor exists within the state, in the nature of things, no question of interstate commerce in that commodity (non-existent) possibly can arise. However, if a state permits importation, manufacture, sale and transportation within its borders—as *Kentucky does*—and if the state thus allows liquors to originate and to exist within its borders—as *Kentucky does*, on a scale of which she boasts—then the state cannot prohibit or regulate *interstate export* traffic therein. *Prevent the origination of intoxicants within its borders, a state may, but once a state has allowed intoxicants to come into existence and to become the potential subjects of interstate commerce, the commodity becomes subject, not only to the police power of the state, but also to the commerce powers of the Nation, and where an attempted exercise of the police power collides with the commerce power, the commerce power prevails and the police power fails.* This brief is replete with the cases in which it solemnly has been determined that in cases of such conflict the



National Law prevails. In the interest of brevity, repetition of citations to these cases is omitted.

Grants of certain rights and privileges a state may withhold (*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357); but if the state elects to grant and allow such rights and privileges the state cannot couple therewith a requirement of the acceptance of unconstitutional conditions (*Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355; *Pullman Company v. Kansas*, *supra*; *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352; *Frost Trucking Co. v. Railroad Commission*, *supra*). The rule is established that constitutional guarantees are not to be abridged by the employment of any such convenient strategem. The establishment of that salutary principle necessarily extirpated the sophistry—which unanalyzed, may be superficially plausible—of inclusion of lesser in greater powers. It is no more permissible to say (a) that because Kentucky may prohibit importation and manufacture of intoxicants, Kentucky may allow importation, manufacture, sale and transportation, on condition that no contract carrier of property by motor vehicle may transport exports of intoxicants in interstate commerce, than it would have been to have said (b) that because Missouri had power to abolish her law school, she might maintain it and exclude negro students therefrom (*Missouri v. Canada*, 305 U. S. 337, 83 L. Ed. 207). The case last cited would seem to have eradicated “the greater power contains the lesser” fallacy unfortu-



nately interpolated by *Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71.

##### 5. *Broadening the Police Power.*

The final Conclusion of Law which plaintiff has assigned as error (Assignment of Errors and Statement of Points, designated "4," subparag. "i," R. 75, 81) is that the states' police powers should be broadened (R. 57). This Conclusion is important because it affords, we believe, a key to an explanation of the District Court's entire Opinion and to the judgment itself, holding that the Control Law is not repugnant to the Commerce Clause or to the Due Process or to the Equal Protection Clauses.

We believe it is accepted legal theory that the police power is neither to be restricted nor broadened; but that the police power represents and comprises the residual powers of the state not delegated to the National government and not limited by Constitutional provisions; and that whatever the police power is, it is, and that it neither waxes nor wanes. That we understand to be the accepted theory. We recognize, of course, that from time to time and in weighing and appraising factual situations in the light of changed conditions, a regulatory measure of a character deemed unreasonable at one time and under one set of conditions then obtaining, at another time and under different conditions contemporaneously obtaining, may be regarded as reasonable. This does not mean that the police power has changed or that it has been broadened; this does not mean that it was restricted or confined in the



first instance or that it was broadened in the latter instance. All that the change signifies is that in the light of changed conditions the Court has arrived at a different conclusion of psychological fact, or, otherwise stated, that the earlier decision " \* \* \* was a departure from the true application" of the governing principles. (Compare, *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. Ed. 703, with *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785.)

However, if a disputant remains unconvinced and adheres to the view that the *Minimum Wage Cases* demonstrate an actual broadening of the police power, we would reply that if his approach be correct, then the National government's commerce powers are to be deemed to have enjoyed like and proportionate growth, and we would invite attention first to the decision in *Adair v. U. S.*, 208 U. S. 161, 52 L. Ed. 436 (*infra*, pp. 113, 114), and contrast the decision therein (that the commerce power does not invest Congress with authority to denounce as a crime an interstate carrier's interference with the labor organization of its employees) with the decision in *Natl. Labor Rel. Bd. v. Jones & Laughlin Steel Co.*, 301 U. S. 1, 81 L. Ed. 893. (Curiously enough, the Opinion below states that the National government's commerce powers have "broadened," R. 53.)

And, if it be conceded, for the purposes of argument, that both the police power and the commerce power have been enlarged, such confession in nowise militates against the validity of the controlling principles, aptly expressed in *Wilkerson v. Rahrer*, *supra*,



"The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. \* \* \* And if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof. *Gibbons v. Ogden*, 22 U. S., 9 Wheat. 210. That which is not supreme must yield to that which is supreme. *Brown v. Maryland*, 25 U. S., 12 Wheat. 448." (Italics ours.)

It is not inappropriate at this juncture to re-read the Chief Justice's concluding admonitory paragraph in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23,

"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles, to



sustain those principles, and, when sustained, to make them the tests of the arguments to be examined." (Italics ours.)

Whatever be the scope of the state's police power, that power is subordinate to the commerce powers of the Nation, and when an attempted exercise of the police power conflicts with the commerce powers, as the Kentucky Control Law conflicts therewith, the inferior state law is invalid, and needs must yield to the Nation's supreme law.

**(J) None of the Cases Relied Upon in the Opinion  
Rendered Below Is In Point.**

Not one of the decisions cited in support of the Conclusions of Law and decisions of the Statutory Three-Judge Court drawn in question upon this appeal is apposite. The only case cited in the Opinion below involving a motor carrier is

**COMMONWEALTH OF PENNSYLVANIA**  
**v. ONE DODGE,**  
326 Pa. 120, 191 Atl. 590, 110 A. L. R. 919 (R. 56, 61).

This case comes closer to being in point than any of the other cases cited in the Opinion below in that it involved both a motor carrier and interstate exportations of whiskey. So far as we have been able to ascertain, it is the only case presenting that combination of facts. However, the Pennsylvania case is clearly distinguishable on many grounds, as we shall show.



American Motor Lines, a partnership, was engaged in the transportation of freight by motor truck between Pittsburgh, Pa., Baltimore, Md., Cumberland, Md., and Washington, D. C. In the conduct of its business the firm hired one Stambaugh to drive his Dodge truck for the firm as it might direct. A 1933 Pennsylvania statute provided that it should be unlawful for any person to transport for hire within the Commonwealth of Pennsylvania any alcoholic liquids without first having obtained a permit from the Commonwealth as provided in the act. The Pennsylvania statute provided that applicants for such permits should give bond for the faithful observance of the permit and of the laws of Pennsylvania, and pay a \$100.00 license fee. Neither the carrier, nor any of the partners, nor Stambaugh, applied for the permit, gave the bond, paid the fee, or secured the permit.

July 24, 1935 (prior to enactment of Motor Carrier Act, 1935), the carrier received from a distiller located at Schenley, Pa., a shipment of liquor for transportation for hire and delivery to a consignee in Washington, D. C. At Pittsburgh the liquor was loaded on the Dodge truck, owned and driven by Stambaugh. After the truck had been loaded, but before it left Pittsburgh, the truck and cargo were seized and impounded because of the failure of the carrier and Stambaugh to obtain a permit. The Pennsylvania act, like the Kentucky Control Law, provided that intoxicants transported in violation of its provisions and the vehicle bearing the same, should be deemed contraband and be subject to confiscation; and the Pennsylvania Court



sustained these provisions in application to the Dodge truck and its cargo.

Obvious grounds of distinction are:

(a) In the Pennsylvania case the carrier, the partners and Stambaugh were eligible to obtain a permit, but declined to apply for the same, declined to execute the required bond and to pay the specified license fee, whereas in the case at bar, under the Control Law, plaintiff has been declared ineligible to receive a Transporter's License merely because it is a contract carrier, and plaintiff seasonably published required notice, made proper application for Common Carrier's Certificate and Transporter's License, executed the required bond, paid the required fees for Common Carrier's Certificate and Transporter's License, and did everything humanly—and corporately—possible to avoid controversy, and to comply with the laws of Kentucky;

(b) In the Pennsylvania case—the question of the power of a state to require an interstate motor carrier to obtain a certificate of convenience and necessity was not involved;

(c) The power of a state to require a contract carrier to convert itself into a common carrier as the price of continuing business was not involved;

(d) The question of the validity of a classification, determining eligibility to operate, based upon whether a motor carrier is a contract carrier or a common carrier, was not involved;

(e) No question of the validity of an act containing penal provisions so extreme and severe as to preclude resort to the Courts in ordinary course was involved;



(f) The reasonableness of the regulation was not presented in the trial court or presented by the record upon appeal, and was said by the appellate court not to have been properly before it—

“The reasonableness of the regulation by the state was not raised, in, nor discussed by, the court below. In his brief in this court counsel for appellees has attempted to argue that the provisions of the act are unreasonable and burdensome, but, as the case was presented in the court below, the question is not properly before us,”

whereas in the case at bar, the question of reasonableness was presented in the District Court below and is properly before this Court;

(g) The State Court's opinion is silent with respect to whether the \$100.00 license fee was devoted to defraying expenses of the department charged with enforcing the Pennsylvania act. It may be that the monies realized from the fees were so devoted, in which event the actual decision of the Pennsylvania Court may have been correct (although reading of the opinion shows the Court's reasons to have been erroneous, and further shows the cases upon which it relied were misinterpreted by it and do not justify the conclusions reached) on the ground that the Pennsylvania act represented but a registration and inspection measure of a character sustainable under the doctrine of *Kane v. New Jersey* and *Clark v. Poor* (ante, pp. 27-29), whereas the Kentucky Control Law cannot be interpreted or sustained as a registration or inspec-



tion act because the Control Law absolutely excludes a contract carrier—in its character as such—from engaging in the business; and

(h) The incident which gave rise to the Pennsylvania case having occurred prior to the enactment thereof, Motor Carrier Act, 1935, did not occupy the field of regulation.

If the foregoing is a correct interpretation of the *One Dodge case*, then that case is not in point, otherwise, the case is in direct conflict with the decisions of this Court. In neither event may the Pennsylvania decision be deemed to afford effective support for the rulings complained of herein.

The other cases cited in the District Court's Opinion (exclusive of those treating of the question of the Statutory Court's jurisdiction to entertain the motion to dismiss, which question is not presented upon this appeal) have less relevancy to the questions here in issue; but we conceive those decisions to demand brief analysis.

**HALTER v. NEBRASKA,**  
205 U. S. 34, 51 L. Ed. 696 (R. 52).

A Nebraska statute prohibited using representations of the National flag upon articles of merchandise for advertising purposes. Defendants exposed for sale a bottle of beer upon which was printed, for advertising purposes, a representation of the flag, were prosecuted under the statute and convicted. In sustaining the validity of the statute the Court pointed out that Congress had established no regulation per-



taining to the use of the flag except with respect to registration of trade-marks. The transaction obviously was an intrastate one and the case has nothing whatever to do with interstate commerce, transportation of exports of liquor in interstate commerce, requirement of conversion of contract carrier into common carrier, classification, excessive penalties, or any of the other questions presented upon this appeal.

SHERLOCK v. ALLING,  
93 U. S. 99, 23 L. Ed. 819 (R. 54, 59).

Defendants were the owners of a line of steamers employed in carrying freight and passengers on the Ohio River between Louisville and Cincinnati. Plaintiff's decedent lost his life in a collision between two vessels of the line which occurred within the territorial jurisdiction of Indiana. Founding his claim upon the Indiana Wrongful Death Statute, plaintiff recovered a judgment for damages, which was affirmed by the highest state Court. Defendants prosecuted writ of error, claiming that the application of the Indiana statute to the marine tort constituted a prohibited interference with interstate commerce. This Court affirmed the judgment, holding that the remedy afforded by the Indiana statute only *indirectly and remotely* affected interstate commerce; and pointed out that *Congress had prescribed no rule* with respect to the liability of owners of vessels for the negligently caused death of a passenger.



COOLEY v. BOARD OF WARDENS,  
12 How. 299, 13 L. Ed. 996 (R. 56).

The validity of a Pennsylvania statute of 1803, prescribing the employment of harbor pilots, was sustained in view of an Act of Congress of 1789 expressly sanctioning such state laws.

UNITED STATES v. ADAIR,  
152 Fed. 737 (R. 56).

A District Court overruled a demurrer to an indictment which charged the violation of a Congressional Act of 1898 which denounced as a criminal offense the making of "Yellow Dog Contracts" by interstate railroads, holding that the Act did not violate the 5th Amendment and that it was competent for Congress to enact the same under the Commerce Clause as a regulation of interstate commerce.

The Three Judge Court below thus relied upon a District Court's decision that it was competent for Congress to prohibit the making of "Yellow Dog Contracts" by interstate railroads in deciding, in the case at bar, that it is competent for a *state legislature* to prohibit a contract motor carrier from continuing to engage in its business,—an entirely different matter, and one concerning which the *powers of Congress and the powers of a state legislature are most dissimilar*. Furthermore, exists the fact, not mentioned in the Opinion below, that after having been convicted in the District Court, Adair appealed to the Supreme Court, which in *Adair v. United States*, 208 U. S. 161, 52 L.



Ed. 436, *reversed* the judgment of conviction, *remanded with directions* to set aside the judgment and the verdict, to sustain the demurrer, and to *dismiss the prosecution*, because in this Court's view the Commerce Clause did not clothe Congress with authority to declare it a crime for an interstate railroad to make a "Yellow Dog Contract," and upon the further ground that the act in question was repugnant to the 5th Amendment.

THE LICENSE CASES (THURLOW v. MASS.),  
5 How. 504, 12 L. Ed. 256 (R. 58).

Three states' statutes prohibiting retail sales of intoxicants without licenses were sustained. The transactions were strictly domestic and essentially *intra-state*. As the Court said, the statutes acted upon the commodity "\* \* \* after it has passed the line of foreign commerce and become a part of the general mass of property in the state." If the *License Cases* be otherwise interpreted, and particularly if they be interpreted to sanction state regulation of interstate imports, the fact remains that in such supposed interstate aspects they have been overruled by *Bowman v. Chicago & N. W. R. R. Company*, *Leisy v. Hardin*, *supra*, and other later cases previously cited which held the states to be powerless to regulate or to prohibit importations of intoxicants.



MINNESOTA RATE CASES (Simpson v. Shepard),  
230 U. S. 352, 57 L. Ed. 1511 (R. 54).

These cases involved *intrastate* railroad rates. The rules established thereby are:

(a) absent Congressional action, a state may prescribe rates for intrastate carriage, even though the prescription thereof indirectly and incidentally affects interstate commerce by creating disequilibrium between intrastate and interstate rates; and

(b) the power of the states so to prescribe such intrastate rates is subject to the proviso that the rates so prescribed shall not be so low as to prove confiscatory.

The decisions in the Minnesota Rate Cases answer none of the questions herein presented, although explanatory *obiter dicta* of the opinion therein correctly enunciate the established rules of interstate commerce and are strictly consistent with our contentions herein.

MUGLER v. KANSAS,  
123 U. S. 623, 31 L. Ed. 205 (R. 52, 58).

This case involved merely *intrastate* transactions. Held: it was competent for Kansas to prohibit the manufacture and intrastate sale of intoxicating liquors. Interstate commerce was not involved, no question was presented under the Commerce Clause and there was no attempted exercise of the police power conflicting with the commerce powers of Congress.



**TOWNSEND v. YEOMANS,**  
301 U. S. 441, 81 L. Ed. 1210 (R. 53, 54).

A Georgia statute, fixing the maximum charges of tobacco warehousemen for handling and selling leaf tobacco, was sustained. The case involved *intrastate* transactions exclusively, and therefore presented no question under the commerce clause. Furthermore, the Georgia statute was found not to have been in conflict with any Federal legislation. The Court distinguished cases involving interstate commerce. There can be no question that the operations of Ziffirin, Inc., constitute interstate commerce, and it would seem clear that the Control Law is in conflict with Federal legislation occupying the field.

**SLIGH v. KIRKWOOD,**  
237 U. S. 52, 59 L. Ed. 835 (R. 54).

This case has been distinguished, *ante*, p. 25.

*BOWMAN v. CHICAGO, N. W. R. R. CO.* and *LEISY v. HARDIN* (R. 56, 57), have been mentioned earlier (*ante*, pp. 36 and 55). They possess no tendency to show the judgment below to be correct: their reasoning and decisions inevitably lead to the contrary conclusion.

Nowhere in its Opinion did the Court below attempt to distinguish any of the cases upon which we then relied, and now rely. It rested its decision upon the cases cited in this section of this brief, and to a considerable extent, it seems, upon *Commonwealth v.*



*One Dodge, supra.* Not one of the cases cited in the Opinion holds, or even intimates, that it is within the power of Kentucky arbitrarily to destroy appellant's interstate business merely because appellant is a contract carrier.

### **ADDITIONAL CONSIDERATIONS.**

The Court below *did not* deny injunctive relief because it conceived (a) that the requisite jurisdictional amount is not in controversy, or, (b) that the action was brought prematurely, or, (c) that the appellant's remedy at law is adequate. However, both in the Court below and heretofore upon this appeal, appellees have contended that the appellant's legal remedy is adequate, and we anticipate that contention will be renewed. Furthermore, upon an appeal from a decree dismissing a bill the scope of inquiry is so broad that we deem it incumbent briefly to discuss the suggested elements even though they were not made grounds of the decision and judgment sought to be reversed.

#### **(K) The Requisite Jurisdictional Amount Is in Controversy.**

The complaint as amended shows that enforcement of the Control Law, and even the threat of enforcement thereof, will destroy appellant's business of transporting export consignments of whiskies from Kentucky in interstate commerce, and that such destruction would damage appellant in a sum and amount exceed-



ing \$75,000.00 (*ante* pp. 12, 13). From the complaint, like from that involved in *Puckard v. Banton*, 264 U. S. 140, 68 L. Ed. 596,

“\* \* \* it sufficiently appears that *the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount.*” (Italics ours.)

In *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142, one of the questions presented was whether the record disclosed that the matter in dispute exceeded, exclusive of interest and costs, the sum and value of \$2,000.00, which at that time was the jurisdictional minimum. In sustaining the jurisdiction the Court said in part:

“\* \* \* there is involved in the controversy presented by the bill *not only the right to enforce against the railway company the payment of statutory penalties much in excess of \$2,000.00, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burden such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony and the master and the court below have found such to be the fact. There is no merit in the contention that there is a want of jurisdiction to entertain the writ of error.*” (Italics ours.)

GIBBS v. BUCK,

— U. S. — (decided April 17, 1939),

reaffirms the principle.



**(L) The Action Was Not Prematurely Brought.**

The complaint as amended shows the Control Law's licensing provisions to have been in effect, and irreparable injuries to have been immediately and certainly impending when the suit was brought. It, of course, is not needful to await the actual happening of threatened injury in order to obtain injunctive relief (*Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. Ed. 1117; reaffirmed on petition for rehearing, 263 U. S. 350, 67 L. Ed. 1144; *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070; *Gibbs v. Buck*, *supra*.)

**(M) Appellant Has No Adequate Remedy at Law.**

The facts showing the inadequacy of appellant's remedy at law have been marshaled for use in another connection (*ante*, pp. 12, 13, 40, 41, 87-90). The inadequacy of appellant's remedy at law has been discussed at length at pp. 5-14 of the printed brief heretofore filed herein for appellant upon appellees' motion opposing appellant's Jurisdictional Statement. We shall not unduly extend this brief by repeating the facts and reiterating the argument, believing that it will suffice presently to say:

(a) Prevention of the numerous and vexatious prosecutions threatened under the Control Law was, and is, essential to safeguard appellant's property rights in its established and profitable business;

(b) A long, unbroken line of decisions holds that equitable jurisdiction exists to restrain criminal prose-



cutions . threatened under unconstitutional statutes when the prevention of such prosecutions is essential to safeguard rights of property (*Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131; *Adams v. Tanner*, 244 U. S. 590, 61 L. Ed. 1336; *Kennington v. Palmer*, 255 U. S. 100, 65 L. Ed. 528; *Terrace v. Thompson*, 263 U. S. 197, 68 L. Ed. 255; *Packard v. Banton*, 264 U. S. 140, 68 L. Ed. 596; *Hy-Grade Provision Co. v. Sherman*, 266 U. S. 497, 69 L. Ed. 402; *Tyson & Bro. v. Banton*, 271 U. S. 418, 71 L. Ed. 718; *Gibbs v. Buck*, *supra*); and

(c) The mentioned rule uniformly has been applied in preventing the enforcement of the penal and criminal provisions of unconstitutional statutes governing motor carriers (*Michigan Public Util. Comm. v. Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *Bush & Sons Co. v. Maloy*, 267 U. S. 317, 69 L. Ed. 627, and *Allen v. Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463).

### CONCLUSION.

In admitting common carriers by motor vehicle to engage in the business of transporting liquors and in declaring them eligible to procure a Transporter's License upon the execution of a nominal bond, and simultaneously, and under threat and intimidation of coercive penalties, in denying plaintiff, in its character of a contract motor carrier, the right to engage in its established business of hauling exports of whiskies from Kentucky in interstate commerce on any terms



whatever, the Kentucky Legislature has established an indefensible classification which merits being stigmatized and denounced as arbitrary, discriminatory and confiscatory. The Control Law, as written and as defendants threaten to enforce the same—under penalties of self-destructive severity—prohibits plaintiff from continuing to conduct its business unless plaintiff converts itself into a common carrier, assumes the added burdens and the more strict liabilities of that class of carrier, and unless plaintiff proves itself to be entitled to and obtains a certificate of public convenience and necessity from Kentucky authorities, and unless plaintiff—of resulting necessity—renounces its existing special contracts and thereby abandons the precise business it would preserve. We shall not extend this brief by discussing—but pause merely to suggest—the confusion which would be produced in plaintiff's affairs and the uncertainty in which its status would be enshrouded before the motor carriers' governing bodies in Indiana and Illinois, and before the Interstate Commerce Commission—all of which know plaintiff as a contract carrier—if plaintiff were to allow itself to be bludgeoned into the shape of a common carrier in Kentucky. Repeatedly—advancing cogent reasons which still obtain—the Court has held that state legislation assuming to require conversion of a contract carrier into a common carrier, as the price of continuance of business, constitutes a taking of property without due process. A state legislature cannot levy such tribute; a contract carrier cannot be pressed so to mutilate and maim itself.



Separable and distinct from its infirmities under the 14th Amendment, but superimposed thereon and cumulative thereto, is the vice of the Control Law's repugnancy to the Commerce Clause and its direct and substantial conflict with Motor Carrier Act, 1935, with which plaintiff has complied, and which expressly authorizes interstate operations by contract carriers in the interstate transportation of "property," and all legitimate subjects of trade and commerce, among which are to be included intoxicating liquors in export. There can be no serious question in the case at bar whether the burdens imposed upon commerce by the Control Law are direct or indirect, or whether they are substantial or incidental. The burdens consist in absolute and complete prohibition and exclusion, which necessarily constitute Constitutionally forbidden obstructions of and impediments upon interstate commerce.

Insofar as the plaintiff's export operations are concerned, the Control Law is in inevitable, direct and substantial conflict with the Commerce Clause and Motor Carrier Act, 1935. It was held, typically, in *Kansas City, Etc., R. R. Company v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 58 L. Ed. 857, that as between the states and the National Government there can be no divided authority over interstate commerce, and the Court found occasion somewhat pungently to observe:

"The decisions also show that a state cannot avoid the operation of this rule by simply invoking the *convenient apologetics of the police power.*" (Italics ours.)



With respect to interstate commerce, the powers of the National Government are exclusive and supreme, and the police power cannot be manipulated to create an exception, for so to do—

“\* \* \* would be to eat up the rule under the guise of an exception.” (*Baldwin v. Seelig, supra*, Italics ours).

The protection afforded by the National Government to plaintiff's interstate operations is not confined to operations upon the State's boundary lines (be they mathematical survey lines or natural monuments), but accompanies, and conveys, the plaintiff's operations into the interior of Kentucky (*Gibbons v. Ogden, supra*; *Brown v. Maryland*, 12 Wheat. 419; 6 L. Ed. 678; *Dahnke-Walker Milling Co. v. Bondurant, supra*; *Bowman v. Chicago, Etc., R. R. Co., supra*; *Leisy v. Hardin, supra*; *L. & N. R. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355; *Kirmeyer v. Kansas*, 236 U. S. 568, 59 L. Ed. 721; *Mich. Pub. Util. Comm. v. Duke, supra*; *Buck v. Kuykendall, supra*; *Bush & Sons Company v. Maloy, supra*; *Allen v. Galveston Truck Line Corp., supra*; *Lemke v. Farmers Grain Company, supra*, and *The Daniel Ball, supra*). It protects not only the interstate operations themselves, but protects also the instrumentalities by which that commerce is conducted. It protects as against seizure and confiscation not only plaintiff's consigned cargoes, but plaintiff's automotive equipment, as well (*Gloucester Ferry Co. v. Penn.*, 114 U. S. 196, 29 L. Ed. 158; *Covington, Etc., Bridge Co. v. Kentucky*, 154



U. S. 204, 38 L. Ed. 962, and *West v. Kansas Natural Gas Co.*, *supra*).

That conformably with Kentucky statutes, state administrative, quasi-judicial departments have denied plaintiff a common carrier's certificate and a liquor Transporter's License does not conclude the matter:

"We shall never immolate truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice." (*Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520.)

Appellant pursued its possible administrative remedies to exhaustion and without avail, to satisfaction of the rule of *Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300, 82 L. Ed. 276, and appellant is remediless at law.

We accordingly believe that palpable, and numerous, errors were committed by the District Court in adjudging the Control Law to be constitutional with respect to plaintiff and plaintiff's interstate export business; that the Court below erred in dissolving the restraining order, in denying plaintiff a preliminary injunction, and in dismissing the complaint as amended; that the orders and decrees appealed from should be reversed, and the cause remanded, with such directions to the District Court below as are usual in such cases and with the further direction that the Court below grant plaintiff an appropriate injunction pending further proceedings, as was directed in *Hammond v. Schappi Bus Line*, 275 U. S. 164, 72 L. Ed. 218.

That such should be the determination of this appeal is not urged upon the basis of *stare decisis*, but on the ground that the reasons underlying the cited de-



cisions relied upon herein are eminently sound, that the commerce of the Nation—so intimately associated with the Nation's welfare—still requires to be protected against the imposition by the states of restrictions and prohibitions, still needs to be safeguarded against discrimination, retaliatory action, disruption and ultimate destruction. If an act, such as the Control Law, is sustainable, our system of Federalism and dual sovereignty is ended, and the era of state autarchy, and its blight, are imminent. National protection of interstate commerce is indispensable if the more perfect union, by the Constitution sought to be accomplished, is to be maintained and perpetuated. (*Gibbons v. Ogden, supra; Wabash, Etc., R. R. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 244; Pennsylvania v. West Virginia, supra.*) The not altogether happy history of our Country under the Article of Confederation (which, it will be remembered, contained no equivalent of the Commerce Clause) adjures staunch adherence to the guaranties so wisely provided, and unflagging, unremitting vigilance in protecting the Nation's commerce from hostile interference by the states, to the end that in the matter of the Nation's commerce, and in all that to it appertains, there be achieved the envisioned destiny—

“\* \* \* a single nation—one and the same people.” (Pa. v. W. Va., *supra*.)

Respectfully submitted,

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HOWELL ELLIS,  
*Counsel for Ziffirin, Incorporated,  
Appellant.*







PERMANENT PROVISIONS OF  
ALCOHOLIC BEVERAGE CONTROL LAW OF  
KENTUCKY

Chapter 23, as amended, and the  
of the Commission of  
and effective April 1, 1935, and the  
of the 1935 Kentucky Statutes, Sec.  
of 1935, page 173, of 1935.

Section 1. This Act shall be known and may  
be cited as the Alcoholic Beverage Control Law of  
Kentucky.

Section 2. The purpose of this Act is to  
regulate the sale and distribution of  
alcoholic beverages in this State.

## APPENDIX.

Section 3. The following are the  
provisions of the Act which are  
to be included in the Appendix:  
1. The definition of "alcoholic  
beverage" as contained in Section 1  
of the Act.  
2. The definition of "retailer"  
as contained in Section 2 of the  
Act.  
3. The definition of "wholesale  
dealer" as contained in Section 3  
of the Act.  
4. The definition of "importer"  
as contained in Section 4 of the  
Act.  
5. The definition of "exporter"  
as contained in Section 5 of the  
Act.  
6. The definition of "distributor"  
as contained in Section 6 of the  
Act.  
7. The definition of "dealer"  
as contained in Section 7 of the  
Act.  
8. The definition of "consumer"  
as contained in Section 8 of the  
Act.  
9. The definition of "license"  
as contained in Section 9 of the  
Act.  
10. The definition of "permit"  
as contained in Section 10 of the  
Act.  
11. The definition of "certificate"  
as contained in Section 11 of the  
Act.  
12. The definition of "licensee"  
as contained in Section 12 of the  
Act.  
13. The definition of "permittee"  
as contained in Section 13 of the  
Act.  
14. The definition of "certificatee"  
as contained in Section 14 of the  
Act.  
15. The definition of "licensee"  
as contained in Section 15 of the  
Act.  
16. The definition of "permittee"  
as contained in Section 16 of the  
Act.  
17. The definition of "certificatee"  
as contained in Section 17 of the  
Act.  
18. The definition of "licensee"  
as contained in Section 18 of the  
Act.  
19. The definition of "permittee"  
as contained in Section 19 of the  
Act.  
20. The definition of "certificatee"  
as contained in Section 20 of the  
Act.



APPENDIX.



**PERTINENT PROVISIONS OF:  
ALCOHOLIC BEVERAGE CONTROL LAW OF  
KENTUCKY,**

*(Being Chapter 2, pages 48, et seq., of 1938 Session Acts of General Assembly of the Commonwealth of Kentucky, approved and effective March 7, 1938, and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, Sec. 2554b-97, et seq., pages 175, et seq.)*

"§1. **SHORT TITLE.** This Act shall be known and may be cited and referred to as the 'Alcoholic Beverage Control Law.' "

"§2.

"(1) 'Alcohol' means and includes ethyl alcohol, hydrated oxide of ethyl or spirit of wine, from whatever source or by whatever process produced.

"(2) 'Alcoholic Beverage' or 'Beverage' means and includes alcoholic spirits, liquor, rum, wine, beer, ale, porter, stout, and every liquid or solid patented or not, containing alcohol in an amount in excess of that now permitted or that may hereafter be permitted under Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, and capable of being consumed by a human being and every spurious or imitation liquor sold as, or under any name commonly used for alcoholic beverages, whether containing any alcohol or not. Provided that there is excepted from this definition of alcoholic beverages the following products if they are unfit for use for beverage purposes:

'(a) medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, national formulary or the American Institute of Homeopathy; (b) patented, patent and proprietary medicines; (c) toilet, medicinal and antiseptic preparations and solutions; and (d) flavoring extracts and syrups.



"(4) 'Board' or 'State Board' or similar abbreviation used herein means the Kentucky State Alcoholic Beverage Control Board created by this Act.

"(10) 'Commissioner' means the Commissioner of Revenue of the Commonwealth of Kentucky.

"(12) 'Department' means the Department of Revenue of the Commonwealth of Kentucky.

"(16) 'Field Representative' means and includes all employees or agents of the Department of Revenue who are regularly employed and whose primary function is to travel from place to place for the purpose of visiting taxpayers and all employees or agents of said Department who may be assigned, temporarily or permanently, by the Commissioner to duty outside of the main office of the Department at Frankfort, in connection with the administration of this Act.

"(17) 'License' means and includes any license issued pursuant to this Act.

"(18) 'Licensee' means and includes any person to whom a license has been issued pursuant to this Act.

"(19) 'Liquor' means and includes all alcoholic beverages.

"(22) 'Person' means and includes individual, partnership, joint stock company, business, trust, association, corporation or other form of business enterprise, including a receiver, trustee or liquidating agent.

"(28) 'Spirits' or 'Distilled Spirits' means and includes any product capable of being consumed by a human being which contains alcohol in excess of the amount now permitted or that may hereafter be permitted by Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, obtained by distilling, mixed with water or other substances in solution, except wine as herein defined."

"§3. FUNCTIONS. The administration of this Act and the regulation of the traffic in alcoholic beverages in this



Commonwealth is hereby vested in the Department of Revenue."

"§4. ORGANIZATION, (a) The administration of this Act in relation to traffic in distilled spirits and wine shall be in charge of a distilled spirits unit, under the supervision of the Commissioner of Revenue. (b) The administration of this Act in relation to traffic in malt beverages shall be in charge of a malt beverage unit, under the supervision of the Commissioner of Revenue."

"§5. ADMINISTRATORS; SALARIES. The distilled spirits unit and the malt beverage unit shall each be headed by an Administrator appointed by the Commissioner of Revenue. The salaries of said Administrators shall be fixed by the Commissioner of Revenue in accordance with Section 4618-154 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition, and they shall be exempt from the test provided for in Section 4618-90 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition."

"§6. POWERS AND DUTIES OF ADMINISTRATORS. The Administrators, subject to the supervision and control of the Commissioner, shall exercise severally any of the functions, powers and duties conferred upon the Department by law, which the Commissioner may delegate to them. The Administrator of the distilled spirits unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in distilled spirits and wine; and the Administrator of the malt beverage unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in malt beverages."

"§7. ALCOHOLIC BEVERAGE CONTROL BOARD; CREATION; FUNCTIONS; LIMITATIONS. The Kentucky Tax Commission shall constitute the Alcoholic Beverage Control Board, which shall have the following functions, powers and duties:



"(1) To adopt reasonable regulations governing the conduct of its own business and the procedure relative to applications for and revocations of licenses and relative to all other matters over which the Board is given jurisdiction by this Act, and for the supervision and control of the manufacture, sale, transportation, storage, advertising, and trafficking of alcoholic beverages throughout the Commonwealth. Such rules and regulations need not be uniform in their application, but may vary in accordance with reasonable classifications.

"(2) To limit in its sound discretion the number of licenses of each kind or class to be issued in this Commonwealth or within any political subdivision thereof, and to restrict the locations of licensed premises. To this end the Board may divide and subdivide this Commonwealth or any political subdivision thereof into sections or districts, provided the classification be reasonable, and the rules and regulations relating to the granting, refusal and revocation of licenses may be different within the several divisions or subdivisions so created." \* \* \*

"§9. POWERS OF MEMBERS, OFFICERS AND EMPLOYEES. The Administrators and all Field Representatives shall have full police powers such as are now vested in sheriffs and other peace officers, provided the jurisdiction of said Administrators and Field Representatives shall be coextensive with the boundaries of the Commonwealth. They shall have authority to inspect or examine any premises where alcoholic beverages are manufactured, sold, stored or otherwise trafficked in, without first having obtained a search warrant; and shall have authority to confiscate any contraband property."

"§13. LEGAL COUNSEL FOR BOARD. The Attorney General of this Commonwealth shall, subject to the approval of the Commissioner of Revenue, appoint an additional assistant Attorney General whose sole duty shall be to act as legal counsel for the distilled spirits unit and the malt beverage unit. The Assistant Attorney General appointed



under this section shall be paid from the Department of Revenue appropriation, an annual salary not to exceed four thousand dollars."

"§18. EXPIRATION DATE OF LICENSES; LICENSE TAXES. All licenses issued under this Act shall expire on June 30th of each year. There shall be the following kinds of licenses, each of which shall be printed so as to be readily distinguishable from each other, to wit: \* \* \*

"(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum."

"§27. BUSINESS AUTHORIZED UNDER A TRANSPORTER'S LICENSE. A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case are authorized by law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be."

"§33. APPLICATIONS FOR LICENSES; ISSUANCE OF SAME. Applications for any license provided for in section 18 of this Act shall be made to the Administrator of the Distilled Spirits Unit at his office in Frankfort, Kentucky; shall be in writing on forms furnished by the Department of Revenue, and verified; and shall set forth in detail such information concerning the applicant and the premises for which the license is sought as this Act or the State Board shall by regulation require. Said application shall be accompanied by a certified check, or cash, or a postal or express money order for the amount of money required by this Act for a license of the kind applied for. If the Administrator shall grant the application he shall issue the proper license in such form as shall be determined by the State Board by regulation, subject to the provisions of section 38 of this Act. No license except those provided in subsections 6 and 8 of section 29 of this Act shall be



issued in less than twenty days or delivered in less than thirty days from the time the application and remittances were received by the Department of Revenue."

"§49. JUDICIAL REVIEW OF ORDER OF BOARD; PARTIES AND PROCEDURE; COSTS. Any order of the Alcoholic Beverage Board refusing a license or revoking or suspending a license may be appealed from by the applicant or licensee, as the case may be, and any order of said Board granting a license or refusing to revoke or suspend a license may be appealed from by any citizen feeling himself aggrieved. The party aggrieved may, within ten days after the entry of the order with which he is dissatisfied, file in the office of the Clerk of the Franklin Circuit Court an attested copy of the order, of all the evidence heard, and of all the steps taken by the said Board relative to the order being contested, provided he shall first post a bond to secure the costs of that action in such sum as may be approved by the Circuit Court, with a corporate surety approved by the Division of Insurance of the Department of Business Regulation as to solvency and responsibility and authorized to transact business in this Commonwealth. The State Board and the licensee or applicant shall be necessary parties to all such appeals. The Circuit Court Clerk shall thereupon docket the case as though it were a petition in equity, and shall immediately issue a summons for said State Board, if the appeal be taken by an applicant or licensee, or a summons for said State Board and the licensee if the appeal be prosecuted by a citizen. Such summons shall be returnable in the same manner as are summonses in equity cases. If the appeal be from an order refusing to grant a license or revoking or suspending a license, it shall be the duty of the State Board, when served with such summons, or of such person as it may designate, to appear and defend the action of the State Alcoholic Beverage Board in refusing to grant or in revoking the license in question. If the appeal be from an order granting a license or refusing to revoke or suspend a license the burden of appear-



ing and defending the action of said Board shall be upon the licensee.

"No formal pleading shall be required in such appeals, but the case shall be set down by the court for as early a day as possible for a hearing, and such appeals shall in all respects to be expedited as are declaratory judgment suits; after such hearing the court shall enter a judgment sustaining or setting aside the order of the State Alcoholic Beverage Control Board appealed from. No new or additional evidence may be introduced in the Circuit Court except as to the fraud or misconduct of some party engaged in the administration of this Act and affecting the order appealed from, but the Circuit Court shall otherwise hear the case upon the record as attested by the Board, and shall in all respects dispose of the appeal in a summary manner, its review being limited to determining whether or not:

"(1) The Board acted without or in excess of its powers.

"(2) The order appealed from was procured by fraud.

"(3) If questions of fact are in issue, whether or not any substantial evidence supports the order appealed from.

"Any party aggrieved by a judgment of the Circuit Court may appeal to the Court of Appeals in the same manner that appeals are taken under the declaratory judgment act.

"If the appeal be from an order refusing to grant a license, or revoking or suspending a license, the costs shall be taxed against the applicant or licensee in any event. If the appeal be from an order granting a license or refusing to revoke or suspend a license, the costs shall be taxed against the citizen who, feeling himself aggrieved, has contested the order, in the event that the order of the Board granting the license or refusing to revoke or suspend the license, is sustained. In the event that such order is set aside with direction to the Board to refuse the license or to revoke or suspend the license, the costs shall be taxed against the licensee.



"No order granting a license shall become effective, and no license thereunder shall be issued, until the expiration of ten days after the date of the entry of such order; and if, within said period of ten days, an appeal from said order shall have been filed as provided by this section, then such order shall not become effective until said appeal shall have been finally determined.

"If a license shall be revoked or suspended by an order of the Board, the licensee shall at once suspend all business or other operations authorized under his license, except as provided in section 46 of this Act, though he may file an appeal in the Circuit Court from the order of revocation or suspension, and no court shall have authority to issue an injunction to suspend the operation of an order of revocation or suspension pending an appeal. If upon appeal to the Circuit Court an order of suspension or revocation is upheld, or if an order refusing to suspend or revoke a license is reversed, and an appeal is taken to the Court of Appeals, no court shall have authority to issue an injunction to suspend the operation of the judgment of the Circuit Court pending the appeal."

"§52. NO TRAFFIC IN ALCOHOLIC BEVERAGES SAVE UNDER LICENSE. It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport, or otherwise traffic in alcoholic beverages without first having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said person shall be required to pay said license for the full year notwithstanding that no license shall be issued,



together with a penalty equal to twenty (20) per cent. of said license tax."

"§53. DECLARING CERTAIN PROPERTY CONTRABAND; PROVIDING FOR ITS DISPOSITION. The following property is hereby declared to be contraband; . . ."

"(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act.

. . . . .

"(6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages.

"Any peace officers, including the Administrators, and field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Control Board, subject to the right of any owner or lienor of property in subsection six above, whose lien is of record to intervene and establish his rights in such property by providing that the property was being used in connection with traffic in alcohol beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being *bona fide* shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have



an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as contraband in connection with the arrest of the defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board."

"§54. (7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

"§89. TRANSPORTATION BY NON-LICENSEE PROHIBITED; EXCEPTION. No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."

"§94. PENALTIES FOR TRAFFICKING IN ALCOHOLIC BEVERAGES WITHOUT A LICENSE. Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction, shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than \$500.00 and not to exceed



\$10,000.00 or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

"§95. PENALTIES FOR VIOLATIONS OF OTHER SECTIONS OF THIS ACT. Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this Act other than section 52 or sections 104 to 117 inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail or workhouse for a term not to exceed six months, or by both such fine and imprisonment. For a second and each subsequent violation of the provisions of any section of this Act other than section 52, whether the section violated be that for which the first conviction was had or not, the offender, upon conviction, shall be punished by a fine not to exceed \$1,000 or by imprisonment for a term not to exceed one year, or by both such fine and imprisonment. The penalties provided for in this section shall be in addition to the revocation of the offender's license; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer or officers responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 10 of this Act."

"§119. TRANSFER OF FUNCTIONS AND RESOURCES OF DIVISION OF ALCOHOLIC CONTROL FROM THE DEPARTMENT OF BUSINESS REGULATION TO THE DEPARTMENT OF REVENUE. The functions of the Division of Alcoholic Control of the Department of Business Regulation are hereby transferred to the Department of Revenue. All books, papers, records, files, office equipment, other property and pending busi-



ness of the said division are likewise transferred to and vested in the Department of Revenue. All employees whose functions are by this Act transferred to and vested in the Department of Revenue are hereby transferred, with their functions, to the said department. The remainder of the appropriation made for the operation of the Division of Alcoholic Control is hereby transferred to and vested in the Department of Revenue to be used for the administration of this Act. In connection with the transfer of the functions of the Division of Alcoholic Control of the Department of Business Regulation to the Department of Revenue, the said Department of Revenue shall be in every way the successor with respect to such functions, and to every act done in the exercise of such functions by or under the authority of the said division. In every instance in which the said division is referred to or designated in any law (not hereby repealed), contract or document, such reference or designation shall be deemed to refer to the Department of Revenue."

"§123. DECLARING AN EMERGENCY. The present uncertainty with respect to the law governing the sale, distribution and use of alcoholic beverages constitutes an emergency, and this Act shall become a law and be effective on its passage and approval by the Governor. Provided, however, that section 70 of this Act shall become effective as provided by the Constitution of Kentucky in the absence of a declaration of emergency; and provided further, that nothing in this Act shall be construed to require any licensee engaged in traffic in alcoholic beverages to pay any additional license tax, or procure any license hereunder, prior to the procurement of the license for the fiscal year 1938-39."



**PERTINENT PROVISIONS OF:  
KENTUCKY MOTOR VEHICLE TRANSPORTATION  
ACT OF 1932, AS AMENDED,**

*(Being Chapter 104, pages 514, et seq., of 1932 Session Acts of General Assembly of the Commonwealth of Kentucky, approved March 17, 1932, and being Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-42, et seq., pages 1457, et seq., as amended by Session Acts of General Assembly of the Commonwealth of Kentucky, 1936 Fourth Extraordinary Session, Chapter 9, pages 105, et seq., approved January 18, 1937, effective April 17, 1937, and being Section 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, et seq.)*

“§2739j-42. **DEFINITIONS.** (a) ‘Motor Vehicle’ means any motor propelled vehicle, not usually operated over or on rails, or not propelled by electric power obtained from overhead wires, while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the limit of any municipality, used for the transportation on the public highways of this State of persons or property for hire, and shall include any such vehicle operated as a unit in combination with other vehicles for any such purpose;

“(b) ‘Operator’ means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, ~~or~~ receiver, appointed by any court whatsoever owning, controlling, operating or managing any motor vehicle used for the transportation of persons or property for hire;

“(c) ‘Common Carrier’ means any operator of a motor vehicle for hire in common carriage;

“(d) ‘Contract Carrier’ means any operator of a motor vehicle for hire other than a common carrier. ‘Contract carrier’ shall not be construed to mean or include any person, firm or corporation who transports only his own property, or who does not engage in the transportation



business but makes occasional or casual trips to transport persons or the property of others for hire;

“(e) ‘Public Highway’ means every public street, alley, road or highway in this State, whether within or without the corporate limits of any municipality;

“(f) ‘Certificate’ means the certificate of public convenience and necessity authorized to be issued under the provisions of this Act;

“(g) ‘Permit’ means the permit to operate authorized to be issued under the provisions of this Act;

“(h) ‘Commission’ means the State Tax Commission of Kentucky.”

“§2739j-45. CERTIFICATE NECESSARY. No common carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a certificate from the Commission.”

“§2739j-46. APPLICATION FOR CERTIFICATE, FORM, OATH. Every application for a certificate shall be made in such form and contain such matters as the Commission may prescribe, and shall be made under oath, signed by the applicant; or, if the applicant be not a person, then by a person having knowledge of the matters therein set forth and duly designated for that purpose by the applicant.”

“§2739j-47. GRANTING CERTIFICATES, PROCEDURE. Upon the filing of any such application and the payment of the fee hereinafter prescribed, the Commission shall, within a reasonable time, fix the time and place for a hearing thereof. A written notice of such hearing, and of the right to file a protest in accordance with said Commission's requirements, shall be mailed by said Commission at least ten (10) days before the hearing of such application to the applicant, to all common carriers (including steam and electric railway companies) serving any part of the route to be served by the applicant, to the Chairman of the State Highway Commission, to the county attorney and county



judge of each county in which the applicant proposes to render service, and to any other person, firm or corporation who may, in the opinion of the Commission, be interested in or affected by the issuance of said certificate."

"§2739j-48. HEARING; PROTESTS MAY BE FILED. At the time fixed in such notice, or at such time thereafter as the Commission may determine, a public hearing upon said application shall be held by said Commission. Any person, firm or corporation having an interest in the subject matter shall have the right, in accordance with the rules and regulations prescribed therefor by said Commission, to file a protest to the granting, in whole or in part of said application, to make representations, and to introduce evidence in support of said protest."

"§2739j-49. ISSUING CERTIFICATE; CONDITIONS MAY BE ATTACHED; PUBLIC HEARING NOT NECESSARY, WHEN. After such hearing the Commission shall have the power to issue to the applicant a certificate, in the form to be prescribed by said Commission, declaring that the public convenience and necessity require the operation for which application is made, or refuse to issue the same, or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by such certificate such terms and conditions as, in its judgment, the public convenience and interest may require; provided, however, if no protest to the granting of the certificate be filed with said Commission prior to the date fixed for the hearing, and if said Commission is satisfied that the privilege sought by the applicant is convenient and necessary in the public interest the certificate may be granted without a public hearing."

"§2739j-50. MATTERS TO BE CONSIDERED IN GRANTING OR REFUSING CERTIFICATE. In granting or refusing to grant such certificate, the Commission shall take into consideration the effect that the proposed operation may have upon public transportation business and facilities of every char-



acter with the territory sought to be served by the applicant, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, and the effect upon the highways and upon the safety of the public using such highways that will probably result from the granting of such application."

"§2739j-51. CONVENIENCE AND NECESSITY TO PUBLIC NECESSARY; PREFERENCE TO CERTAIN OPERATORS. No such certificate shall be issued until the applicant has established to the satisfaction of the Commission, upon consideration of the matters mentioned in the preceding section, that the privilege sought by the applicant is convenient and necessary in the public interest. If two or more operators who have been engaged in the transportation of property for compensation, before this act becomes effective, apply for a certificate authorizing them to perform substantially the same service in the same territory under similar conditions, and if the said Commission shall be of the opinion that, in accordance with the provisions of this Act, certificates should be granted to some but not all of such applicants, preference shall be given to the operator or operators who have been longest engaged in such service, provided such service has been rendered in accordance with the requirements of the law."

"§2739j-54. POWERS AND DUTIES OF COMMISSION. The Commission shall have the power and authority, by general order or otherwise, to prescribe rules and regulations governing common carriers; it shall have authority to fix or approve the rates, fares, charges, classifications, rules and regulations of each such common carrier, to regulate operating schedules so as to insure adequate and convenient transportation service, to prescribe a uniform system and classification of accounts to be used, to require the filing of annual and other reports, and to supervise and regulate such common carriers in all other matters in which the public interest is involved."



“§2739j-55. **ABANDONMENT OR CHANGE OF ROUTE.** No common carrier shall abandon or change any route or service without an order of the Commission that public convenience and necessity permit such abandonment or change. Applications for any such abandonment or change shall be made in accordance with the requirements of said Commission, and the procedure on an application for an abandonment or change of route shall be the same as herein provided for the issuance of a certificate; provided, however, if it becomes necessary on account of the condition of the roads or other emergency, temporary changes in route, service and schedules may be made.”

“§2739j-56. **RATES TO BE REASONABLE.** Every rate demanded or received by any common carrier shall be just and reasonable.”

“§2739j-57. **ADEQUATE SERVICE TO BE FURNISHED.** Every common carrier shall furnish adequate, efficient, safe and reasonable service.”

“§2739j-58. **SCHEDULE OF RATES, ETC., TO BE FILED; OPEN TO PUBLIC INSPECTION.** Under such rules and regulations as the Commission may prescribe, every common carrier shall maintain on file with said Commission a schedule of the rates, fares, charges and classifications, if any, and a time schedule, if any, of all motor vehicles operated under the authority of said Commission, and shall keep open for public inspection at designated offices so much of said schedules, rates, fares, charges and classifications, as well as time schedules, as said Commission may deem necessary for public information.”

“§2739j-59. **REGULAR RATES TO BE CHARGED; REFUNDS NOT PERMITTED.** No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with and approved by said Commission and in effect at the time; nor shall any company refund or remit in any



manner or by any device any portion of the rates, fares or charges so specified, nor make or give any unreasonable preference or advantage to any person; nor subject any person to any unreasonable prejudice or discrimination."

"§2739j-61. **FIXING RATES.** If the Commission, after a hearing held after reasonable notice upon its own motion or upon complaint, finds any existing rate or rates to be excessive, unreasonable or unjustly discriminatory, or the services rendered or the facilities employed by any common carrier to be unsafe, inadequate, inconvenient or in any wise in violation of law or the rules and regulations of said Commission, it may determine the just and reasonable rates to be charged thereafter, or the reasonable, safe, convenient and adequate service to be thereafter furnished, and shall fix the same by order; provided, however, that nothing in this Act shall be construed to require the Commission to fix the same rates for motor carriers subject to this Act as are or may be fixed for carriers engaged in other methods of transportation."

"§2739j-62. **NECESSITY FOR REGULATION OF CONTRACT CARRIERS DECLARED.** It is hereby declared that the business of contract carriers is affected with the public interest, and that the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of common carriers require the regulation of contract carriers to the extent hereinafter provided."

"§2739j-63. **CONTRACT CARRIERS TO OBTAIN PERMITS.** No contract carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a permit from the Commission."

"§2739j-64. **APPLICATION FOR PERMIT, HEARING.** Applications for permits shall be made in the manner and form provided for in the Commission's regulations and said Commission may, if it deems it advisable, require a public



hearing to be held thereon, and in this event it shall give written notice thereof to all persons who may, in the opinion of said Commission, be interested in or affected by the issuance of such permit at least ten days prior to the time fixed for such hearing."

"§2739j-65. ISSUING PERMIT. Upon the payment of fees hereinafter prescribed, the Commission shall have power to issue to the applicant a permit, in the form to be prescribed by said Commission, authorizing the operation for which application is made, provided the applicant has established to the satisfaction of said Commission that the privilege sought will not endanger the safety of the public or interfere with the public's use of the highways or impair the condition or maintenance of such highways."

"§2739j-86. APPEAL FROM DECISION OF COMMISSION, PETITION, SUMMONS TO ISSUE. When any application for a certificate or permit has been refused, the applicant shall have the right to appeal, or if the application is granted, any person who has filed a protest to the granting of such application shall have the right to appeal as hereinafter provided. The appellant may, within twenty (20) days after the rendition of the order of the Commission, file a petition of appeal with the Clerk of the Circuit Court of Franklin County. Such petition shall state completely the grounds upon which the review is sought, shall assign all errors relied on, and shall be accompanied by a copy of the record, certified by said Commission, or an abstract thereof if agreed to by all parties to the hearing before said Commission. The appellant shall furnish copies of the petition to each person who was a party to the hearing before said Commission. Summons shall be issued upon the petition, directing the adverse party or parties to file answer within fifteen (15) days after service thereof."

"§2739j-87. REVIEW BY CIRCUIT COURT. No new or additional evidence may be introduced in the Circuit Court except as to fraud or misconduct of some person engaged in the administration of this Act and affecting the order,."



ruling or award, but the court shall otherwise hear the case upon the certified record or abstract thereof, and shall dispose of the case in summary manner, its review being limited to determining whether or not: One. The Commission acted without or in excess of its power; Two. The order, decision award was procured by fraud; Three. The order, decision or award is in conformity to the provisions of this Act; Four. The finding of facts in issue is supported by any substantial evidence."

"§2739j-88. REVIEW. PROCEEDINGS, PARTIES, JUDGMENT, REMANDING CASE; APPEAL TO COURT OF APPEALS. The Commission and each party shall have the right to appeal in such review proceedings. The Court shall enter judgment, confirming, modifying or setting aside the order, decision or award, or, in its discretion, remanding the case to the Commission for proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing of facts, remand the cause to said Commission. Any party may appeal from the decision of the Circuit Court to the Court of Appeals. Such appeals to the Court of Appeals shall have precedence of other cases pending."

"§2739j-94. EXEMPTIONS FROM ACT. There shall be exempted from the provisions of this Act: \* \* \* Two. Motor vehicles for hire operating exclusively within the limits of a city or incorporated town, or within ten miles of its limits, Provided, however, that the operator of any such motor vehicle for the carriage of passengers, operating between any city or incorporated town and a point or points within ten (10) miles of the limits thereof, and over regular routes or between fixed termini, may apply to the commission for a Certificate. \* \* \*"

"§2739j-95. ACT TO APPLY TO INTERSTATE COMMERCE. This Act and every part thereof shall apply and be construed to apply to interstate commerce, except insofar as the same may be in conflict with the provisions of the Constitution of the United States and the Acts of Congress."



**PERTINENT PROVISIONS OF:  
1936 GOVERNMENTAL REORGANIZATION ACT OF  
COMMONWEALTH OF KENTUCKY,**

*(Being c. 1, Art. XVI, Secs. 1, 2 and 3, pp. 32, 33, Acts of Extraordinary Session of General Assembly of Commonwealth of Kentucky, which commenced February 24, 1936; Carroll's Kentucky Statutes, Baldwin's 1936 Revision, Secs. 4618-113 to 4618-115, inclusive, pp. 2486, 2487.)*

“§1. **FUNCTIONS.** The Department of Business Regulation shall have and exercise all the administrative functions of the State except as otherwise provided in this Act in relation to (a) the supervision of motor transportation for hire; (b) the regulation of the manufacture and sale of intoxicating liquors; (c) the supervision of banks and kindred financial institutions; (d) the regulation of insurance practices; and (e) the administration of examining functions for professional and semi-professional groups, except as provided herein.

“All functions heretofore vested by law in the Athletic Board of Control, the Department of Motor Transportation of the Department of Revenue and Taxation, the functions assigned by Chapter one hundred and forty-six (146), Acts of the General Assembly of 1934, to the State Tax Commission, the Department of Banking and Securities, the Department of Insurance, the Department of Health, insofar as are concerned with examining boards explicitly mentioned in this section are hereby transferred to and vested in the Department of Business Relation.

“§2. **ORGANIZATION.** The Department of Business Regulation shall be headed by a Commissioner of Business Regulation who shall be the Chairman of the Public Service Commission and shall be divided for administrative purposes into a division of motor transportation, a division of alcoholic control, a division of banking, a division of



securities, a division of insurance, and a division of professional standards. The heads of the divisions of said Department shall be appointed by the Governor.

"§3. DIVISION OF MOTOR TRANSPORTATION. The division of motor transportation, headed by a director, under supervision of the Commissioner of Business Regulation, shall have and exercise all the functions in relation to the regulation of motor vehicles for hire and of their operation, heretofore provided by law and assigned to the Department of Revenue and Taxation. The qualifications of the director of this division shall include four years experience in the work of motor vehicle regulation or equivalent experience."

### **PERTINENT PROVISIONS OF:**

#### **"MOTOR CARRIER ACT, 1935,"**

*(Act of Cong. August 9, 1935, c. 498, 49 Stat. 543, et seq., as amended by Act of Cong. June 29, 1938, c. 811, 52 Stat. 1237, et seq.; U. S. C. A., Title 49, Secs. 301, et seq. Pocket Pamphlet Supplement, pages 69, et seq.)*

"§301. SHORT TITLE. This chapter may be cited as the 'Motor Carrier Act, 1935.'

"§302. DECLARATION OF POLICY AND DELEGATION OF JURISDICTION TO INTERSTATE COMMERCE COMMISSION.

"(a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop



and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this chapter.

“(b) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

“(c) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

### “§303. DEFINITIONS AND EXCEPTIONS.

“(a) *Definitions.* As used in this chapter.—

“(1) The term ‘person’ means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

“(2) The term ‘board’ or ‘State board’ means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.



"(3) The term 'Commission' means the Interstate Commerce Commission.

"(4) The term 'joint board' means any special board constituted as provided in section 305 of this chapter.

"(5) The term 'certificate' means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

"(6) The term 'permit' means a permit issued under this chapter to contract carriers by motor vehicle.

"(7) The term 'license' means a license issued under this chapter to a broker.

"(8) The term 'State' means any of the several States and the District of Columbia.

"(9) The term 'express company' means any common carrier by express subject to the provisions of Chapter 1 of this title.

"(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water.

"(11) The term 'foreign commerce' means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

"(12) The term 'highway' means the roads, highways, streets and ways in any State.

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not in-



clude any vehicle, locomotive, or car operated exclusively on a rail or rails.

“(14) The term ‘common carrier by motor vehicle’ means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of chapter 1 of this title.

“(15) The term ‘contract carrier by motor vehicle’ means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

“(16) The term ‘motor carrier’ includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

“(17) The term ‘private carrier of property by motor vehicle’ means any person not included in the terms ‘common carrier by motor vehicle’ or ‘contract carrier by motor vehicle,’ who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

“(18) The term ‘broker’ means any person not included in the term ‘motor carrier’ and not a *bona fide* employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise



as one who sells, provides, furnishes, contracts, or arranges for such transportation.

“(19) The ‘services’ and ‘transportation’ to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

“(20) The term ‘interstate operation’ means any operation in interstate commerce.

“(21) The term ‘foreign operation’ means any operation in foreign commerce. As amended June 29, 1938, c. 811, §2, 52 Stat. 1237.

“(b) *Vehicles Excepted from Operation of Law.* Nothing in this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a *bona fide* taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owner or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as



defined in section 1141j of Title 12; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service; or (6) motor vehicles used in carrying property consisting of livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 302 of this chapter, shall the provisions of this chapter, except the provisions of section 304 of this chapter relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of such municipality or municipalities, except when such transportation is under a common control, management or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."



“§304. POWERS AND DUTIES OF COMMISSION.

“(a) *Powers and Duties Generally.* It shall be the duty of the Commission—

“(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

“(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

“(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

“(7) To inquire into the organization of motor carriers and brokers and into the management of their business, to keep itself informed as to the manner and method in which the same is conducted, and to transmit to Congress, from time to time, such recommendations as to additional legislation relating to such carriers or brokers as the Commission may deem necessary. (As amended June 29, 1938, c. 811, §4, 52 Stat. 1237.)”

“§306. CERTIFICATE OF CONVENIENCE AND NECESSITY.

“(a) *Necessity for; Motor Carriers in Bona Fide Operation on June 1, 1935.* Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public



highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 310, if any such carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in *bona fide* operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of *bona fide* operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve



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such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter. (As amended June 29, 1938, c. 811, §8, 52 Stat. 1238.)

*"(b) Application for Certificate; Form and Contents.*

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission." (Feb. 4, 1887, c. 104, Part II, §206; as added Aug. 9, 1935, c. 498, 49 Stat. 551, as amended June 29, 1938, c. 811, §8, 52 Stat. 1238.)

*"§307. ISSUANCE OF CERTIFICATE.*

*"(a) Issuance Authorized to Qualified Applicants for Regular Routes and Between Fixed Termini.* Subject to section 310, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate



shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

"(b) *Certificate not to Confer Proprietary or Property Rights in Highway.* No certificate issued under this chapter shall confer any proprietary or property rights in the use of public highways."

"§309. CONTRACT CARRIERS BY MOTOR VEHICLE.

"(a) *Permit Essential to Operation: Carriers in Bona Fide Operation on July 1, 1935; Laws Relating to National Parks and Monuments Unaffected.* Except as otherwise provided in this section and in section 310a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in *bona fide* operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of *bona fide* operation



to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. Provided further, That nothing in this chapter shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States. (As amended June 29, 1938, c. 811, §9, 52 Stat. 1238.)

“(b) *Application for Permit; Form and Contents; Issuance of Permits; Terms and Conditions.* Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able, properly to perform the service of a contract



carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the policy declared in section 302 (a) of this chapter; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304 (a) (2) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

"§310. DUAL OPERATION.

"No person, after January 1, 1936, shall at the same time hold under this chapter a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 302 (a) of this chapter."

"§316. (b) *Rates, Facilities for Carriers of Property.* It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, ob-



serve, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

“(c) *Through Routes and Joint Rates.* Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

“(d) *Undue Preference or Prejudice Prohibited.* It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discriminations, prejudice or disadvantage to the traffic of any other carrier of whatever description.”



“§318. SCHEDULES OF CONTRACT CARRIERS BY MOTOR VEHICLE.

“(a) *Filing and Posting Schedules and Contracts Affecting Rates; Notice of and Hearing on Proposed Changes; Undue Preferences.* It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules or, in the discretion of the Commission, copies of contracts containing the minimum charges of such carrier for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed and posted in accordance with the provisions of this chapter. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules or copies of contracts, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful



for any such carrier by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: Provided, That any such carrier or carriers, or any class or group thereof may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the policy declared in section 302 (a) of this chapter."

"§322. UNLAWFUL OPERATION.

"(a) *Violation of Chapter or Rules or Orders; Penalty where none Otherwise Provided.* Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than \$100 for the first offense and not more than \$500 for any subsequent offense. Each day of such violation shall constitute a separate offense."

"§327. EFFECTIVE DATE OF CHAPTER. This chapter (except this section, which shall become effective immediately upon approval) shall take effect and be in force on and after the 1st. day of October, 1935: Provided, however, That the Commission shall, if found by it necessary or desirable in the public interest, by general or special order, postpone the taking effect of any provision of this chapter to such time after the 1st. day of October, 1935, as the Commission shall prescribe, but not beyond the 1st. day of April, 1936."



## **PERTINENT FEDERAL LIQUOR CONTROL LAWS.**

### **XXI AMENDMENT TO CONSTITUTION OF THE UNITED STATES.**

"SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

### **WILSON ACT.**

U. S. C. A., Title 27, Section 121.

"§121. STATE STATUTES AS OPERATIVE ON TERMINATION OF TRANSPORTATION; ORIGINAL PACKAGES. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. (Aug. 8, 1890, c. 728, 26 Stat. 313.)"



## WEBB-KENYON ACT.

U. S. C. A., Title 27, Section 122.

“§122. SHIPMENTS INTO STATES HAVING DRY LAWS; PROHIBITION. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, c. 90, 37 Stat. 699; Aug. 27, 1935, c. 740, §202 (b) 49 Stat. 877.)”

## LIQUOR ENFORCEMENT ACT OF 1936.

U. S. C. A., Title 27, Sections 221 to 228, inclusive.

“§221. CITATION OF CHAPTER.

“This chapter may be cited as the ‘*Liquor Enforcement Act of 1936*.’ (June 25, 1936, c. 815, §1, 49 Stat. 1928.)”

“§222. DEFINITIONS.

“(a) Wherever used in this chapter the word ‘State’ shall mean and include every State, Territory, and possession of the United States, unless otherwise specifically provided.



“(b) As used in this chapter the word ‘vessel’ includes every description of water craft used, or capable of being used; as a means of transportation in water or in water and air; and the word ‘vehicle’ includes animals and every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air. (June 25, 1936, c. 815, §2, 49 Stat. 1928.)”

“§223. TRANSPORTING INTO STATE WHERE SALE PROHIBITED; PENALTY; STATE DEFINITION OF INTOXICATING LIQUOR ADOPTED.

“(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

“(b) In order to determine whether any one importing, bringing, or transporting intoxicating liquor into any State, or any one attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State. (June 25, 1936, c. 815, §3, 49 Stat. 1928.)”



“§224. SEIZURE AND FORFEITURE.

“All intoxicating liquor involved in any violation of this chapter, the containers of such intoxicating liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited. Such seizure and forfeiture, and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws. (June 25, 1936, c. 815, §4, 49 Stat. 1928.)”

“§225. ENFORCEMENT; CONFERRING POWERS AND DUTIES; REGULATIONS.

“The Secretary of the Treasury shall enforce the provisions of this chapter and of sections 388 to 390 of Title 18.

“The Secretary of the Treasury is authorized to confer and impose upon the Commissioner of Internal Revenue and any of his assistants agents or employees and upon any other officer employee or agent of the Treasury Department any of the rights, privileges, powers, duties, and protection conferred or imposed upon the Secretary of the Treasury, or any officer or employee of the Treasury Department, by this chapter, or by *any law now or hereafter in force relating to the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, distilled spirits, wine, fermented liquors, or denatured alcohol.*” (Italics ours.)

“Regulations to carry out the provisions of this chapter shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. (June 25, 1936, c. 815, §5, 49 Stat. 1929.)”

“§226. EFFECT ON OTHER LAWS; CANAL ZONE.

“Nothing contained in this chapter shall repeal any other provisions of existing laws except such provisions



of such laws as are directly in conflict with this chapter and nothing in this chapter shall apply to the Canal Zone. (June 25, 1936, c. 815, §10, 49 Stat. 1930.)”

“§227. SEPARABILITY PROVISION.

“If any provision of this chapter, or the application thereof to any person or circumstances, be held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstance, shall not be affected thereby. (June 25, 1936, c. 815, §11, 49 Stat. 1930.)”

“§228. EFFECTIVE DATE.

“This chapter shall be effective as of the thirtieth day following June 25, 1936. (June 25, 1936, c. 815, §12, 49 Stat. 1930.)”

KNOX ACT.

U. S. C. A., Title 18, Section. 390.

“§390. (CRIMINAL CODE, section 240.) SAME; SHIPPING PACKAGES IN INTERSTATE COMMERCE NOT PLAINLY MARKED.

“Whoever shall knowingly ship or cause to be shipped from one State or Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, or other fermented liquor, or any compound containing any spirituous, vinous, malted, or other fermented liquor fit for use for beverage purposes, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than \$1,000 or imprisoned not more than



one year, or both; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law. (As amended June 25, 1936, c. 815, §8, 49 Stat. 1930.)"

### **PERTINENT PROVISIONS OF: FEDERAL ALCOHOL ADMINISTRATION ACT**

*(Being Act of Cong. Aug. 29, 1935, c. 814, Sec. 1, 49 Stat. 977, U. S. C. A., Title 27, Sec. 201, et seq.)*

#### **"§205. UNFAIR COMPETITION AND UNLAWFUL PRACTICES.**

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate. \* \* \*

"(c) *Labeling.* To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Administrator, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Administrator finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or



statements likely to be considered as statements of, alcoholic content of malt beverages are hereby prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification; if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: Provided, That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 19, 1935; including regulations requiring, at time of release



from customs custody, certificates issued by foreign governments covering origin, age and identity of imported products; Provided further, That nothing herein nor any decision, ruling, regulation or other action of any Department of the Government or official thereof shall deny the right of any person to use wholly or in part the wine names or brands Port, Sherry, Burgundy, Sauterne, Haut Sauterne, Rhine (Hock), Moselle, Chianti, Chablis, Tokay, Malaga, Madeira, Marsala, Claret, Vermouth, Barbera, Cabernet, Saint Julien, Riesling, Zinfandel, Medoc, or Cognac, or any other geographic name of foreign origin (except Champagne), upon any of the foregoing produced in the United States if of the same type and the use of such name or brand is qualified by the name of the State or other locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand: And provided further, That except as herein expressly provided as to said names or brands, nothing in this section shall be held in any wise to affect or abridge any of the powers granted to the Federal Alcohol Administration to provide standards of identity, quality, labeling, or other regulations.

"It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Administrator authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

"In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection, (1) no bottler of distilled spirits, no producer, blender,



or wholesaler of wine, or proprietor of a bonded wine storeroom, and no brewer or wholesaler of malt beverages shall bottle, and (2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine or malt beverages, respectively, after such date as the Administrator fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15, 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless, upon application to the Administrator, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages issued by the Administrator in such manner and form as he shall by regulations prescribe: Provided, That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Administrator, he shows to the satisfaction of the Administrator that the distilled spirits, wine, or malt beverages to be bottled by the applicant are not to be sold, or offered for sale, or shipped or delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Administrator; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final



action by the Administrator upon any application under this subsection; \* \* \* (Aug. 29, 1935, c. 814, §5, 49 Stat. 981; Feb. 29, 1936, c. 105, §2, 49 Stat. 1152; June 26, 1935, c. 830, Title V, §§505, 506, 49 Stat. 1065, 1966.)”

\* \* \*

“§207. PENALTIES; JURISDICTION; COMPROMISE OF LIABILITY.

“The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States Court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are hereby vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or section 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than \$1,000 for each offense. Subject to the approval of the Attorney General, the Administrator is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of \$500 for each offense, to be collected by the Administrator and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation that the United States may, on its own motion upon five days' notice to the violator, cause a consent decree to be entered by any court of competent jurisdiction enjoining the repetition of such violation. (Aug. 29, 1935, c. 814, §7, 49 Stat. 985.)”

\* \* \*

“§209. DISPOSAL OF FORFEITED ALCOHOLIC BEVERAGES.

“(a) All distilled spirits, wine, and malt beverages forfeited, summarily or by order of court, under any law of



the United States, shall be delivered to the Secretary of the Treasury to be disposed of as hereinafter provided.

“(b) The Secretary of the Treasury shall dispose of all distilled spirits, wine and malt beverages which have been delivered to him pursuant to subsection (a)—

“(1) By delivery to such Government agencies as, in his opinion, have a need for such distilled spirits, wine, or malt beverages for medicinal, scientific, or mechanical purposes; or

“(2) By gift to such eleemosynary institutions, as in his opinion, have a need for such distilled spirits, wine or malt beverages for medicinal purposes; or

“(3) By destruction.

“(c) No distilled spirits, wine, or malt beverages which have been seized under any law of the United States, may be disposed of in any manner whatsoever except after forfeiture and as provided in this section.

“(d) The Secretary of the Treasury is authorized to make all rules and regulations necessary to carry out the provisions of this section.

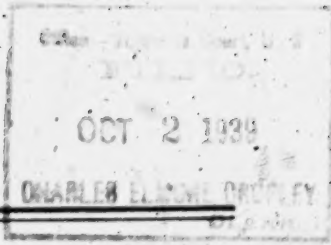
“(e) Nothing in this section shall affect the authority of the Secretary of the Treasury, under the customs or internal-revenue laws, to remit or mitigate the forfeiture, or alleged forfeiture, of such distilled spirits, wines, or malt beverages, or the authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to compromise any civil or criminal case in respect of such distilled spirits, wines or malt beverages prior to commencement of suit thereon, or the authority of the Secretary of the Treasury to compromise any claim under the customs laws in respect of such distilled spirits, wines, or malt beverages. (Aug. 29, 1935, c. 814, §9, 49 Stat. 987, as amended June 26, 1936, c. 830, Title V, §507, 49 Stat. 1966.)”







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# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIEFRIN, Incorporated,

Appellant,

*versus*

JAMES W. MARTIN, Commissioner of Revenue of the  
Commonwealth of Kentucky, Et Al.,

Appellees.

## REPLY BRIEF FOR APPELLANT.

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# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

---

ZIFFRIN, INCORPORATED, - - - - - *Appellant,*

*v.*

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - - - *Appellees.*

---

## REPLY BRIEF FOR APPELLANT.

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We desire herein, as succinctly as may be done, to analyze the more pertinent and important decisions cited and relied upon in the brief for appellees, and to make reply to certain of the arguments advanced in that brief,—without conceding the merits of other matters urged by opposing counsel, discussion of which is omitted because of limitations we feel should be imposed.

### I.

#### REPLY TO COMMERCE CLAUSE ARGUMENT.

The arguments advanced by opposing counsel, and the decisions cited by them, do not demonstrate that the Control Law is not obnoxious to the Commerce Clause and Acts of Congress enacted in pursuance thereof.



We shall disregard detailed discussion of many cases cited by opposing counsel, of no relevancy whatever, because the commerce involved was intrastate in character, such as *Minnesota Rate Cases*, 230 U. S. 352; *Townsend v. Yeomans*, 301 U. S. 441; *Samuels v. McCurdy*, 267 U. S. 188; *Hodge Co. v. Cincinnati*, 284 U. S. 335; *Stephenson v. Binford*, 287 U. S. 251, and *Eichholz v. Public Service Comm.*, 306 U. S. 268. In this connection we likewise shall disregard cases cited by opposing counsel, in which the facts showed only *incidental* and *indirect* interferences with interstate commerce in matters of local concern and where (unlike the case at bar) the field of regulation was unoccupied by Federal legislation, such as *Sherlock v. Alling*, 93 U. S. 99; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177; *Nashville, Chattanooga & St. Louis R. R. Co. v. Alabama*, 128 U. S. 96; *Hennington v. Georgia*, 163 U. S. 299; and *Kelly v. Washington*, 302 U. S. 1.

Neither shall we enlarge upon *Clason v. Indiana*, 306 U. S. 439; *Sligh v. Kirkwood*, 237 U. S. 52, or *State Board of Equalization v. Young's Market*, 299 U. S. 59, all sufficiently discussed in the principal brief for appellant.

However, we deem it important to analyze in some detail three cases upon which appellees' counsel appear principally to rely in support of their contention that it is competent for the State to prohibit the exportation of intoxicating liquors. The authorities so relied upon are: *Kidd v. Pearson*, 128 U. S. 1; *Geer*



v. *Connecticut*, 161 U. S. 519; *Hudson County Water Co. v. McCarter*, 209 U. S. 349.

*Kidd v. Pearson*, *supra*, involved an Iowa Statute which prohibited the manufacture of liquor except for medicinal, sacramental and scientific purposes. Kidd held a license to manufacture for such non-beverage purposes. He had manufactured liquors but the same had not been devoted to the mentioned non-beverage purposes but had been sold by him in other States for beverage purposes. The State brought suit in equity seeking the abatement of Kidd's distillery as a nuisance. Kidd contended that in application to his business the statute constituted an interference with interstate commerce. The Court drew a sharp line of demarcation between manufacture and commerce, pointed out that the former necessarily preceded commerce and that manufacture was essentially and exclusively an intrastate and domestic affair; further pointed out and held that the manufacture for other than the non-beverage purposes permitted by the statute was illegal and the distillery consequently subject to abatement as a nuisance, irrespective of the fact that after such illegal manufacture was completed the product was introduced into interstate commerce. In other words, the contemplated subsequent commerce was not permitted to save the illegal manufacture from the denunciation of the statute. This decision, however, is not in any sense the equivalent of a ruling that it would have been competent for Iowa to have prohibited exportation of intoxicants brought into ex-



istence in a legal manner, and the Court took pains to make this perfectly clear, saying:

"The proposition that, *supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded.* Here, however, the very question underlying the case is whether the goods ever came lawfully into existence." (Italics ours.)

In *Hudson County Water Co. v. McCarter, supra*, the Court sustained the validity of a New Jersey statute which prohibited a riparian owner from diverting the water of a New Jersey river to New York State for commercial purposes. This is an entirely different question from that presented in the case at bar, inasmuch as the diversion so prohibited amounted to alienation of a part of the public domain, owned in common by all of the people of New Jersey and in which the riparian owner had special, qualified interests, but certainly no fee simple title.

*Geer v. Connecticut, supra*, certainly sustained the validity of a Connecticut statute which prohibited the killing of game birds for the purpose of selling the same in interstate commerce. The Court held that game birds are *ferae naturae*, that they are owned in common by all of the citizens of the State, with the result:

"The common ownership imports the right to keep the property, if the sovereign so chooses, always within the jurisdiction for every purpose"

and



"to confine the use of such game to those who own it, the people of that state."

It is to be observed that Mr. Justice Brewer and Mr. Justice Peckham took no part in the decision, and that Mr. Justice Field and Mr. Justice Harlan vigorously dissented on the ground that when reduced to possession by the hunter the birds became the private property of the taker and thereupon subject to the protection of the Commerce Clause. Nevertheless, the majority opinion took the view, and we concede the decision holds, that game birds, after having been reduced to possession, nevertheless, are part of the natural resources of the State, and at the sovereign's election may be excluded from interstate commerce. However, the strength and persuasiveness of this decision in application to the situation existing at bar are reduced to the vanishing point by the Court's later decisions dealing with other natural resources of the States and holding that interstate commerce therein may not be prohibited by the States, particularly the *natural gas cases*, *West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania v. West Virginia*, 262 U. S. 553, 263 U. S. 350; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; *Peoples Natural Gas Co. v. Public Service Comm.*, 270 U. S. 550, and the case of oil transported in pipe line, *Eureka Pipe Line Co. v. Hallahan*, 257 U. S. 267. We concede that it is difficult to harmonize the decision in *Geer v. Connecticut*, *supra*, with the decisions in the cited oil and gas cases. With respect



to such reconciliation perhaps nothing better can be said than so sagely was remarked by Mr. Justice Holmes in writing the opinion for the Court in *Hudson County Water Co. v. McCarter*, *supra*:

“It constantly is necessary to reconcile and to adjust different constitutional principles, *each of which would be entitled to possession of the disputed ground but for the presence of the others* \* \* \*.” (Italics ours.)

Alcoholic liquors—things never part of the public domain, things never *ferae naturae*, but manufactured products—are more closely akin to the automobile bodies in transit in *Michigan, Public Utilities Co. v. Duke*, 266 U. S. 570, than they are to game birds. This view would seem to find support in the decision in *Heyman v. Hayes*, 236 U. S. 178. The attempted imposition of the privilege tax upon exports of liquor, there denounced, certainly constituted less interference with interstate commerce than an absolute prohibition of exportation.

Furthermore, as we have argued in our principal brief, exportation and importation are but different aspects of the same transaction, and under the Commerce Clause exportation of intoxicants now is entitled to the same full measure of protection that was accorded importation of intoxicants prior to the adoption of the 21st Amendment and the enactment of the Wilson Act, the Webb-Kenyon Act and kindred legislation.



We do not believe that the cases relied upon by opposing counsel show that there is any attribute of sovereignty which enables a State to allow the domestic manufacture, transportation and sale of intoxicants, to permit the exportation thereof by the distiller, by common carriers by rail and by common carriers by motor, and simultaneously to prohibit exportation thereof in interstate commerce by contract carriers by motor.

Neither is it to be overlooked that *Congress had not occupied the field of regulation with which the Court was concerned in Geer v. Conn, supra.*

## II.

**NEITHER THE CONTROL LAW NOR THE FACTS SUPPORT APPELLEES' CONTENTION THAT THE WHISKEY INVOLVED WAS MANUFACTURED UPON CONDITION THAT IT WOULD BE CARRIED ONLY BY THE DISTILLER OR BY COMMON CARRIERS.**

Neither the provisions of the Control Law nor the facts support appellees' contention (opposing brief, pp. 23, 24, 26) that the whiskey here involved was manufactured upon condition that it would be carried only by the distiller or by common carriers.

*Kidd v. Pearson, supra*, admittedly holds, and the rule is, that a State may absolutely prohibit the manufacture of intoxicants except for specified non-beverage purposes and may permit manufacture conditional upon the distillation being for the specified permitted purposes.



Opposing counsel undertake to find in Kentucky's 1938 Kentucky Alcoholic Control Law a basis for invoking this rule, to the end that they may argue that the Control Law permits manufacture upon condition that the manufactured product will be transported only by the distiller or by common carriers, and to the further end of arguing that unless so transported the manufactured product is not to be deemed "property" within the meaning of that term as used in Motor Carrier Act, 1935. However, the provisions of the Control Law and the facts in this case are such as not to be susceptible to the application of the mentioned hypertéchnical theory.

Before approaching the particular provisions of the Control Law in question and the pertinent facts before the Court, we desire briefly to analyze and to put in their proper setting the cases upon which opposing counsel rely.

*Clark v. State* (Tenn.), 113 S. W. (2d) 374.

Tennessee had been a bone-dry State. Tennessee enacted a so-called, and somewhat unique, local option law, which permitted the voters of a particular county to determine whether intoxicants might be made within its confines solely for export to and sale in other States, all sales within Tennessee continuing prohibited. The suit represented a contest between a State official and a county official with respect to whether such a local option election should be held, and it seems clear from a reading of the opinion that the suit was of a friendly



character for the purpose of testing the constitutionality of the statute, primarily under the Tennessee Constitution. It is true that the law provided that liquors so manufactured should be transported only by the manufacturer or by common carriers. However, no contract carrier was a party to the proceeding, the question of transportation by manufacturer or common carrier was but one among a multitude presented and was a minor issue, almost an insignificant one, dealt with in passing with but the briefest and most scant attention. *No mention was made of Motor Carrier Act, 1935.* It is an understatement merely to say that the case is not a persuasive one.

Another case relied upon in the same connection by opposing counsel is *Jefferson County Distilling Co. v. Clifton*, 249 Ky. 815, which properly to be understood must be read and considered in its proper setting and perspective. *This case was not decided under the 1938 Alcoholic Beverage Control Law.* It was decided prior to the repeal of the 18th Amendment to the Federal Constitution and at a time *when Kentucky was "dry"* under a prohibition amendment to the State's Constitution and under the Rash-Gullion Act, the enforcement act enacted pursuant to that amendment, both quoted in the opinion. *Like the Iowa statute in Kidd v. Pearson, supra*, both the State Constitutional Amendment and the Rash-Gullion Act prohibited, and denounced as criminal offenses, the manufacture, sale or transportation of intoxicants *except* for sacramental, medicinal, scientific or mechanical purposes, provi-



sion for which exceptions was made in the amendment's and statutes' *principal enacting clauses*. The provisions of the Control Law, of course, are of quite a different character. The facts of the case—of a distinguishable character—also are important. The Jefferson County Distilling Co. was a Kentucky corporation, authorized by its charter to engage in the business of a distiller and had been so engaged consistently with the provisions of the Volstead Act and the Kentucky prohibition laws. In 1933, when it became apparent that repeal of the 18th Amendment was probable, the Distilling Company became desirous of increasing its capital stock and of selling its shares to the public. In that connection it made application to the appellee, Miss Clifton, Deputy Commissioner of the Kentucky Securities Department in charge of the Securities Division, for permission to do so, and in compliance with the various "blue-sky" requirements the distiller filed with Miss Clifton a copy of the prospectus which it proposed to use in connection with the sale of the new securities. This prospectus stated that in the event of the repeal of the 18th Amendment, and, *even though the State Constitutional Amendment and the Rash-Gullion Act should not be repealed*, the distiller would be authorized to engage in the manufacture of whiskey in the State of Kentucky *for beverage purposes and to transport and sell its whiskies for beverage purposes in other States*. Miss Clifton deemed these representations of the prospectus to be incorrect and misleading, and accordingly refused to allow the shares to be sold under the prospectus.



Thereupon, the distiller brought suit against Miss Clifton under the Declaratory Judgment Act, and the Court of Appeals held that Miss Clifton's view was correct and that the representations in the prospectus were erroneous.

The opinion in the case was written in contemplation of the existing law, including the then existing State dry laws, constitutional and statutory, prohibiting all manufacture, sale or transportation of intoxicants except for mentioned non-beverage purposes. The case thus was analogous to *Kidd v. Pearson*, *supra*, which the Kentucky Court cited and followed. But in 1934 and 1935 the State prohibition amendment and the Rash-Gullion Act were repealed. (See notes to Ky. Const., Sec. 226a appearing in Baldwin's 1936 Revision of Carroll's Ky. Stats., and Act of March 17, 1934, 1934 Ky. Session Acts, c. 146, Art. IX, Sec. 1, p. 663.) Since repeal of prohibition, and under the 1934 Liquor Control Act and the 1938 Control Law in question the laws of Kentucky have been materially different from those which evoked the expressions of the opinion quoted at page 34 of the opposing brief, and under presently existing laws, the views so expressed would be inappropriate. (See predecessor to present Control Law—Act of March 17, 1934, Session Acts 1934, c. 146; Baldwin's 1936 Revision of Carroll's Kentucky Stats., Sec. 2554b-1, *et seq.*)

If for purposes of argument it be conceded that in the exercise of its sovereign powers a State may permit manufacture of intoxicating liquors only upon speci-



fied valid conditions, the theory and proposition so conceded are totally inapplicable to the facts of the case at bar.

From March 17, 1934, to July 1, 1938, on which latter date the licensing provisions of the Control Law became effective, there was no law in Kentucky providing that intoxicants could be transported only by the distiller or by a common carrier, and during that period, as the complaint alleges (R. 8, 9), Ziffrin, Inc., was duly licensed by the appropriate Kentucky authorities to transact its liquor exportation business, and was engaged therein. Suddenly, on July 1, 1938, and by the operation of the pretended provisions of the Control Law, Ziffrin was declared ineligible further or longer to conduct its business. We take the liberty of asking one rhetorical question,—what liquor was Ziffrin prevented from hauling on and after July 1, 1938, when was that liquor made, and what, if any, were the conditions annexed to its manufacture? Obviously, that liquor was made prior to *July 1, 1938*. Prior to *July 1, 1938*, no condition of transportation by common carrier was annexed to the privilege of manufacturing liquor in Kentucky. We are indebted to the brief for appellees, page 63 and footnote at page 4, showing that on *June 30, 1938, stored in internal revenue bonded warehouses in Kentucky* were stocks of intoxicating liquors of a volume *exceeding 192,350,000 gallons*. The record does not show it, but the Court, we presume, will take judicial notice, that on *July 1, 1938*, and immediately thereafter and



for some period of time thereafter, Ziffrin was not engaged to transport to the consuming markets in Indianapolis and Chicago corn whiskey hot from the stills, that its contracts of carriage contemplated the transportation of aged liquors and part of the stock of upwards of 192,350,000 gallons manufactured prior to June 30, 1938, and prior to the time that any conceivable claim can be made that the whiskey was manufactured subject to the condition that it be transported by distiller or by common carrier. Nothing in the record in this case shows, and nothing in the record in this case could be made to show, that on July 1, 1938, or at any time up to the present, appellant proposed to carry a single gallon of unaged liquor manufactured subsequent to June 30, 1938. That would seem sufficient to dispose of the specious contention that the Control Law is valid because it imposed transportation by common carrier as a condition of manufacture.

However, we shall go a step farther. Possibly the theory (*dangling in nubibus*) of an annexed condition, obligatory upon a Kentucky distiller engaging in manufacture in the State, will prove acceptable to an occasional mind hospitable to theories unduly refined and technical. Perhaps such minds will envisage a compact, tacitly assented to, entered into between the distiller and the State according the privilege of manufacture to the distiller and imposing upon the distiller the condition of transportation in his own vehicles or by common carrier. But minds which accept that theory will find difficulty in binding Ziffrin,



Inc., to the bargain. Ziffrin, appellant, is an Indiana corporation. Nothing in its chartered existence subjects appellant to Kentucky law. No Kentucky law can exclude appellant from penetrating Kentucky in the transaction of interstate commerce. Consequently, though a domestic distiller making a run of whiskey in contemplation of existing law conceivably might be taken to have submitted to the conditions supposed to be imposed by that law, no such assertion may be made with respect to Ziffrin's operations.

We proceed a third step. Previously we have assumed that the Control Law appends to the grant of the privilege of manufacturing the condition of transportation by common carrier. The truth is that in according the privilege and distiller's license to the manufacturer, the Control Law does no such thing. The only transportation restriction coupled with the grant of the privilege of distilling is that found in Sec. 21, Baldwin's 1939 Supplement to Carroll's Ky. Stats., Sec. 2554b-118, providing: " \* \* \* no distilled spirits or wine shall be transported on the same truck or vehicle with malt beverages, except by a common carrier."

The truth of the matter is that the eligibility requirements exacted of applicants for a Transporter's License are imposed by an entirely separate and distinct section of the Control Law, Section 54, subparagraph 7 (Appendix to principal brief for appellant, p. 10). There are provisions pertaining to the permitted and prohibited activities of distillers on the one



hand (Secs. 21 and 22, *infra*) and of transporters on the other. (Sec. 27, aforesaid Appendix, p. 5.) There is nothing whatever in the Act which provides, or even suggests, that the privilege of manufacturing liquor is granted upon the condition that the manufactured product shall be carried by common carriers, and that unless it be so carried the product does not acquire the status of property. On the contrary, the concluding paragraph of the contraband section (Sec. 53, aforesaid Appendix, p. 9) not less than 10 times speaks of whiskey carried by an unlicensed carrier as "*property*"; speaks repeatedly of its "*owner*"; distinguishes between "*owner*" and "*one in possession*"; provides for decretal sale of such property, for transfer of the title thereto, and for the protection of the interests of an innocent "*lienor*."

The argument that whiskey is not property is stultified by the Control Law's express language and provisions, and by the adversary brief's statement, page 4, that almost 50,000 people in Kentucky are directly connected with the whiskey business.

The provisions of the Control Law according the privilege of distilling are contained in Sections 21 and 22, Carroll's Kentucky Statutes, Sections 2554b-118 and 2554b-119, which read as follows:

"§21. *Business Authorized Under Distiller's, Rectifier's or Vintner's License, Respectively.* A distiller's, rectifier's or vintner's license, as the case may be, shall authorize the holder thereof, at the premises specifically designated in the license,



to engage in the business of distiller, rectifier, or vintner, as the case may be, as those terms are defined in this Act, and to transport for himself only any alcoholic beverage which he is authorized under this license to manufacture or sell, provided that he so transports such beverages by a truck, wagon, or other vehicle owned and operated by himself, and which shall have affixed to its sides at all times a sign of such form and size as may be prescribed by the State Board, containing among other things the name and license number of the holder of such license, and further provided that no distilled spirits or wine shall be transported on the same truck or vehicle with malt beverages, except by a common carrier.

“§22. *Transactions Permitted and Prohibited to Distillers, Rectifiers, and Vintners:* Sales and deliveries of alcoholic beverages may be made at wholesale, and from the licensed premises only, (1) by distillers to licensed rectifiers, licensed vintners, holders of special non-beverage alcohol licenses so far as they are authorized to make the purchases, or other licensed distillers; by rectifiers to licensed vintners, or to licensed distillers provided distilled spirits sold to distillers are packaged in retail containers; by vintners to licensed rectifiers or other licensed vintners, or to the holders of special non-beverage alcohol licenses; or (2) by distillers, rectifiers or vintners to licensed wholesalers; or (3) by licensed distillers, rectifiers or vintners for export out of the Commonwealth; provided, no distiller, rectifier or vintner, shall sell or contract to sell, give away or deliver any alcoholic beverages to any person, who is not duly authorized by the law of the State of his residence



and of the Federal Government if located in the United States, to receive and possess said alcoholic beverages; and in no event shall he sell or contract to sell, give away or deliver, any of his products to any retailer or consumer in Kentucky.

“Distillers may purchase distilled spirits only from other licensed distillers in this Commonwealth or in another state, territory or province.

“Rectifiers may purchase distilled spirits or wine only from distillers or vintners licensed under this Act; or from non-residents duly authorized by the law of the State of their residence and by the Federal Government, if located in the United States, to make the sales.

“Vintners may purchase distilled spirits or wine only from distillers or vintners licensed under this Act or from non-residents duly authorized by law of the State of their residence and by the Federal Government, if located in the United States, to make the sales.

“Provided nothing in this Act shall be construed to prohibit the purchase or sale of warehouse receipts by any person or persons but this provision shall not authorize the owner of any such receipt to accept delivery of any distilled spirits unless the owner is qualified under this law to receive the same.”

Nothing in the elaborate provisions quoted suggests annexation of the supposed condition.

Despite considerations previously suggested and the further fact that, together with all other property, whiskey is taxed in Kentucky on an *ad valorem* basis, at page 19 of their brief opposing counsel say:



"As Kentucky has said that liquor may only be manufactured and trafficked in in Kentucky according to her laws, one of which is that it shall only be transported by a licensee under this Act in question, or a railroad or railway express company, *there is no property right in such liquor transported in any other fashion and hence it is not property within the meaning of the Motor Carrier Act of 1935.*" (Italics ours.)

We previously have suggested that the liquor in question was not manufactured subject to the terms of the Control Law, but was manufactured before enactment of the Control Law. Were the facts otherwise, nevertheless in any realistic view it could not well be said that liquor is not to be deemed "*property*" within the meaning of the Motor Carrier Act, 1935. When Ziffirin operates its trucks in Louisville it submits to the conditions imposed by valid Kentucky laws, city ordinances included. If the argument to which we reply is sound, then it logically would follow that if one of Ziffirin's drivers should offend against a speed regulation prescribed by the Kentucky Statutes or by Louisville ordinance, or should fail to sound his horn at an intersection, or should take on a load in excess of the prescribed maximum, or should park by a fire hydrant, that thereupon and forthwith the truck not only ceases to be "*property*" under Kentucky law, but also ceases to be a "*motor vehicle*" within the meaning of Motor Carrier Act, 1935. Fictions are invented and manipulated by courts always to accomplish justice, never to wreak spoliation. Some arguments—and



counter arguments, as well—may be pressed too far. We desist.

### III.

#### **THE ARGUMENT OF OPPOSING COUNSEL DOES NOT SHOW THE REQUIREMENT OF A COMMON CARRIER'S CERTIFICATE TO BE A REASONABLE REGULATION.**

Opposing counsel in their brief, pages 6, 9, 44, 49, attempt to justify the requirement of a Common Carrier's Certificate on the ground that it is necessary, or at least expedient, to channelize the movement of whiskies in transit and, consequently, that it is reasonable to restrict issuance of the "Transporter's License" to common carriers by motor vehicle and to holders of such Common Carrier's Certificates, because thereby—opposing counsel assume—it will be assured that the carrier will operate to and from definite termini, on prescribed routes and on regular schedules. This assumption is contrary to the facts, and if it were consistent with the facts the requirement of a Common Carrier's Certificate nevertheless would be unreasonable, as we shall demonstrate.

The brief for appellees shows that Kentucky, in efforts to prevent diversion, relies upon written reports (pp. 9, 10) rather than upon actual policing of the highways (p. 5). These reports would prove as effective with respect to carriage by contract carriers by motor as to carriage by common carriers by motor.

Motor Carrier Act, 1935, U. S. C., Title 49, Section 303, sub-sec. a, sub-parags. 14, 15 (App. to our prin-



principal brief, p. 25), defines the two classes and distinguishes between them on the basis whether the carrier does, or does not, undertake to carry "for the general public." No mention whatever is made of termini or schedules with respect to either class, and subparagraph 14 expressly contemplates transportation by common carriers "over regular or *irregular routes*."

The complaint shows Ziffrin's operations in Kentucky to be conducted within the corporate limits of the city of Louisville, a city of the first class, and within a radius of ten miles of its limits. Under Kentucky Statutes, Section 2739j-94 (Appendix to our principal brief, p. 20), even a *common carrier* so operating would be exempt from the provisions of the Kentucky Motor Vehicle Transportation Act, would not be required to obtain a Common Carrier's Certificate, and would be under no obligation to run between definite termini, on prescribed routes or on definite schedules. Thus, neither under Federal nor State law are operations between definite termini, on prescribed routes and on fixed schedules essential characteristics of common carriers; although, of course, when considerations of public convenience and necessity are injected, in order to show the existence of public necessity and convenience, contemplation of termini, routes and schedules necessarily rises to the surface. But as we have said, even under the Kentucky law a common carrier by motor vehicle, operating as Ziffrin operates, would not be required to have a Common Carrier's Certificate, would not be required to operate between fixed termini, on specified routes or on fixed schedules. Accordingly,



opposing counsel have indulged in an erroneous assumption of fact, which vitiates their argument concerning the reasonableness of the regulation.

But if we completely dismiss from mind this first nullifying error, and if we assume that it is reasonable to require a carrier which hauls intoxicants to operate between fixed termini, on prescribed routes and regular schedules, the requirement of obtention of a Common Carrier's Certificate remains obnoxious to the Commerce Clause, to the Federal Motor Carrier Act, 1935, and to the Due Process and Equal Protection Clauses of the 14th Amendment. For purposes of argument we shall concede that it would have been, and is, competent for Kentucky, by the Control Law, or by companion legislation, to require a carrier engaged in hauling intoxicants to make reports of the character identified at pages 9 and 10 of the brief for appellees and to specify its termini, routes and schedules. All of these things we will concede reasonably, and with validity, might have been required of Ziffrin, Inc., as a contract carrier. But this is not what the General Assembly has done, except incidentally. The General Assembly, by requiring a Common Carrier's Certificate, not only has provided (in some instances, but not in all, as previously shown) for fixed termini, regular schedules and specified routes, but in addition thereto in all instances has imposed the obnoxious and unconstitutional burdens of showing and establishing *public convenience and necessity* and of submission to State regulation of all rates and services and has required



the assumption by contract carriers of the greater measure of liability appertaining to common carriers. No reasonable police purpose is served by the inclusion of these additional and coupled obnoxious requirements, which transcend the State's powers, and the vice of which is not purged by the circumstance that in requiring a Common Carrier's certificate the State accidentally, and in some instances, gains the claimed, but dubious, advantages of fixed termini, specified routes and regular schedules. It would have been entirely possible and readily feasible for the permissible to have been segregated from the interdicted, but this separation the General Assembly did not make.

As a plain matter of business, Schenley and Seagram are vitally interested in seeing to it that their customers' orders are filled by delivery of the consigned cargoes. Ziffrin's consignee-customers, who purchase their requirements from Jefferson County distillers, have a corresponding interest in receiving the merchandise they order. If Ziffrin, or any other carrier engaged to render transportation services by either distillers or purchasers, diverted the cargoes and omitted to deliver the same to the purchasers, the diversion evil—without intervention of Kentucky or Federal authorities—quickly would be extirpated by action of the distillers or consignee-customers themselves, who simply would cease doing business with Ziffrin or with such other offending carrier. The real source of the danger of diversion to "bootleg" channels, referred to at pages 5, 17 and 43 of the opposing



brief, is not to be found in the carriers. The source of any such existing danger is to be found at some distilleries. Curiously enough, the Control Law, Sec. 21, *supra*, permits the distiller to transport liquors of his own manufacture. We appreciate that perfect classification is not essential to the validity of a statute, but the fact that distillers are allowed to transport their own output is highly significant in connection with the contention that prevention of diversion renders the prohibition of transportation by contract carriers reasonable, particularly so when we consider that *the termini, route and schedule complex in no way affects movements of liquors by distillers.*

There is nothing in the record concerning "hi-jacking," but this subject having been injected by the brief filed by opposing counsel, pages 5, 17 and 43, for the purposes of reply, we take the liberty of going outside the record to say that Ziffrin's success in obtaining the business of the country's leading distillers has been attributable in large measure, to the protection against hi-jacking which Ziffrin has afforded through the instrumentality of a convoy system which Ziffrin invented, inaugurated and maintains.



## IV.

**THE OPPOSING BRIEF DOES NOT SATISFACTORILY  
DISTINGUISH THE MOTOR CARRIER CASES.**

Opposing counsel, in their brief, page 46, undertake to distinguish a number of the motor carrier cases relied upon in the principal brief for appellant upon the ground that enforcement of the statutes there involved would have prevented the transaction by the carriers of *all* business in the enacting States, whereas, in the case at bar, enforcement of the Control Law, as written, prevents Ziffrin, Inc., only from further engaging in the branch, or department, of its business devoted to the carriage of exports of whiskies from Kentucky. Admittedly this difference exists, but we do not deem it a sufficient ground for drawing a distinction or line of demarcation. The complaint alleges that since January 1, 1935, the business of transporting whiskey in export from Kentucky has been the chief and principal part of appellant's business and activities penetrating Kentucky, and the complaint shows that branch of the business to have been, and to be, a lucrative one and a part of the business giving promise of future growth and expansion (R. 9, 10, 43, 44).

It would not seem to be cogent argument to assert, as opposing counsel contend, that although under the Commerce Clause and the 14th Amendment, Kentucky's General Assembly may not prohibit *all* of Ziffrin's interstate activities penetrating Kentucky, nevertheless, it is competent for the General Assembly



to impose the ban upon the most valuable, profitable and lucrative branch of that business. It is our contention that if the Commerce Clause and the 14th Amendment prevent the imposition of a ban upon the business in its entirety, then those same constitutional guaranties adequately safeguard and protect all substantial and valuable parts, branches and departments of the business and enterprise.

## V.

### SEPARABILITY OF THE PENALTIES.

Opposing counsel contend that even though the penalty provisions of the Control Law be deemed too severe and excessive to be valid, nevertheless, the Control Law is not objectionable by reason thereof because (a) the denunciatory rule applicable to excessive penalties is invoked only in cases of legislative rates or "orders legislative in their nature," (b) there has been no attempt to enforce the penalties, and (c) the penalty provisions are separable.

We concede that the majority of cases in which severe penalties have been held to be void under the 14th Amendment have been cases involving rates. However, the applicability of the rule has not been confined to rate cases, as is shown by *Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300. Whether that case represents a case of an order legislative in its nature within the purview of the criticism interposed by opposing counsel, we do not know. But so far as the logic of the matter goes, it would not appear that there



is good or sufficient reason for limiting application of the rule in the manner suggested by opposing counsel.

It would seem no answer to assert that there has been no attempt to enforce the penalties. Injunction is a preventive remedial process. The complaint clearly alleges threats of immediate attempts to enforce the Control Law's penal, criminal and contraband provisions. Opposing counsel cite *Grand Trunk Railway Co. v. Michigan R. R. Com.*, 231 U. S. 457, and *Phoenix R. Co. v. Geary*, 239 U. S. 277. In the former case, the Railroad Commission suspended the carrier's tariff for interchange of traffic at Detroit. The carrier brought suit to restrain the suspension order. Apparently, imposition of penalties was not threatened and no injunction was sought against their imposition. In the latter case, suit was brought to enjoin the Arizona Corporation Commission from enforcing an order directing appellant to double-track a portion of its line of street railway and to enjoin the institution of proceedings for recovery of fines and penalties. However, the opinion does not indicate that institution of such proceedings was threatened.

*Where the infliction of excessive penalties is imminent and threatened, and is not attempted only because prevented by restraining order, it would not seem that an injunction should be denied because the intended attempt was so thwarted.* Were this Court to rule as urged by appellees' counsel, then as surely as in the disparaged rate cases, Ziffrin could test the penalties' validity only by violation. Certainly, de-



termination of that question in a suit such as this not only is a safer method for the carrier, but also has much to commend it as a more dignified, law-abiding and orderly approach to solution of the problem.

It is not our contention that the substantive regulatory provisions of the Control Law are invalid merely because of the excessive penalties provided for infractions. Our contentions are that the substantive provisions are void by reason of their essentially obnoxious character and substance; that they are further and additionally stripped of the last vestige of integrity and validity by reason of the coupled extravagant penalties; that substantive and deterrent provisions are void, jointly and severally; and that standing alone and separately, the penalty provisions themselves, prevention of enforcement of which is the primary concern in this case, are condemned and void by reason of their excessive character.

## VI.

### MISAPPREHENSION WITH RESPECT TO APPELLANT'S CONTENTIONS CONCERNING NON-AVAILABILITY OF INJUNCTION.

Apparently opposing counsel have misunderstood our contentions with respect to the non-availability of an injunction. This matter was dealt with in our principal brief, pp. 119, 80-90. We endeavored to make it clear that our contention of non-availability of an injunction was restricted to the *statutory appeals* from the decisions of the Director of the Division



of Motor Transportation, denying appellant a Common Carrier's Certificate, and from the decision of the Alcoholic Beverage Control Board, denying appellant a liquor Transporter's License. We did not mean to convey the impression that we contend that in a plenary, original injunction suit in a State Court of Kentucky, directly challenging the constitutionality of the Control Law, the injunctive process would have been non-existent.

*Beacon Liquors v. Martin, et al.*, — Ky. — (decided March 24, 1939, but for some reason not yet reported), cited by opposing counsel, was a plenary suit, instituted originally in the Franklin Circuit Court, challenging so much of the 1938 Alcoholic Beverage Control Law as prohibits the issuance of a retailer's license to a liquor store situated within 200 feet of a church, without the assent of the church's governing body. This case *was not a statutory appeal* from a decision of the Alcoholic Beverage Control Board.

*Keller v. Kentucky Alcoholic Beverage Control Board*, 279 Ky. 272, cited by opposing counsel, was a case in which *Keller pursued the statutory appeal* from an order of the Control Board revoking his beer license. Despite the clear prohibition of the Control Law, Keller somehow succeeded in obtaining a temporary restraining order from the Franklin Circuit Court, to which his appeal was first taken, and a temporary injunction pending appeal to the Court of Appeals, the latter having been granted by a Judge of the Court



of Appeals. *The opinion gives no explanation of the ground upon which these injunctions were obtained, manifestly in plain contravention of the express and explicit provisions of the Control Law.* Upon the appeal to the Court of Appeals, Keller urged that the provisions of the Control Law prohibiting the grant of an injunction are unconstitutional. *The Court of Appeals declined to rule upon this point,* and dismissed Keller's contentions in the indicated particular on the familiar ground that no one will be permitted to question the constitutionality of a statute who is not injuriously affected thereby; and that Keller actually having been granted the injunctions despite the provisions of the Control Law to a contrary effect, Keller had not been injuriously affected by the provisions prohibiting injunctions of which he complained, and would not be heard to question their validity. This case is no authority whatever on the question whether the Control Law's provisions prohibiting the granting of injunctions in connection with statutory appeals from decisions of the Alcoholic Beverage Control Board prevents the statutory appeal from constituting an adequate remedy at law. Neither does the case afford authority upon the question whether the Control Law's provisions for drastic penalties, read in the light of its provisions forbidding injunctions, do not create a situation in which resort to the Courts in ordinary course is precluded, with the consequence that the penalties constitute both a denial of due process and of equal protection.



## CONCLUSION.

In general, we repose but little confidence in comparisons and illustrations. Either the facts of the supposititious case are like those of the principal case, or they are not: in the latter event the illustration is valueless, and in the former consideration may as well be addressed to the facts of the principal case as to the facts of the illustrative case. However, in the present instance so much has been written, so many aspects have been considered; and we have been so long and in such proximity to the problem that it may be helpful to obtain the more objective, detached and fresh view of the matter which may be provided by an illustration. We accordingly take the liberty.

Like the distillation and sale of whiskey, the manufacture and sale of cigarettes is one of Louisville's and Kentucky's big industries. Like whiskey, cigarettes draw their ingredients from the State's soil, are bootlegged, and hi-jacked from trucks. As of intoxicants, this Court has said of cigarettes, that many persons entertain the view that cigarettes possess "deleterious tendencies" and "their effects may be injurious to some" (*Austin v. Tennessee*, 179 U. S. 343). Even as it has held with respect to liquors, this Court has held the regulation or prohibition of the manufacture, sale and advertising of cigarettes to be within the police power of the States (*Austin v. Tennessee*, *supra*; *Gundling v. Chicago*, 177 U. S. 183; *Packer Corporation v. Utah*, 285 U. S. 105).



In a case of first impression it would be startling to discover a decision that it is within the competence of Kentucky, under the guise of the police power, to provide by statute that cigarettes may be transported only by the manufacturer thereof or by a common carrier, and that no contract carrier by motor vehicle, even though operating with the sanction and authority of the Interstate Commerce Commission under Motor Carrier Act, 1935, shall be permitted to continue to engage in its established and profitable business of transporting export consignments of cigarettes from Louisville to Chicago in interstate commerce.

If opposing counsel are correct in their contentions, bench and bar confidently may expect the discriminatory cigarette transportation legislation and possibly the ultimate so-called "Balkanization" of the world's greatest free trade area. Our efforts are addressed to the prevention of that end result. There have been those who have been active in the erection of State barriers to interstate commerce. This case poses the question whether the trend shall be arrested or whether the architects and engineers will be commissioned to erect forty-eight staunch Chinese Walls.

Respectfully submitted,

NORTON L. GOLDSMITH, AND  
 HOWELL ELLIS,  
*Counsel for Ziffrin, Incorporated,  
 Appellant.*







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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 8

ZIFFRIN, INCORPORATED,

*Appellant,*

vs.

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE  
COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT OPPOSING JURISDICTION.

HUBERT MEREDITH,  
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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

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**No. 695**

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**ZIFFRIN, INCORPORATED,**

*Appellant,*

*vs.*

**JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE  
COMMONWEALTH OF KENTUCKY, ET AL.**

---

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.**

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**DEFENDANTS' MOTION IN OPPOSITION TO PLAINTIFF'S JURISDICTIONAL STATEMENT.**

**Filed February 8, 1939.**

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In this case the plaintiff made application to the Director of the Motor Transportation Department for a hearing on his application for a certificate as a common carrier. The Director denied the certificate.

As the plaintiff felt that his rights were abrogated by the ruling of the Director, his remedy was to appeal to the



Franklin Circuit Court, Frankfort, Kentucky. This right is granted under two sections of the Motor Transportation Act of the Commonwealth of Kentucky. They are as follows:

"SECTION 2739j-87. No new or additional evidence may be introduced in the Circuit Court except as to fraud or misconduct of some person engaged in the administration of this Act and affecting the order, ruling or award, but the court shall otherwise hear the case upon the certified record or abstract thereof, and shall dispose of the case in summary manner, its review being limited to determining whether or not: One. The Commission acted without or in excess of its power; Two. The order, decision or award was procured by fraud; Three. The order, decision or award is in conformity to the provisions of this Act; Four. The finding of facts in issue is supported by any substantial evidence."

"SECTION 2739j-88. The Commission and each party shall have the right to appear in such review proceedings. The court shall enter judgment, confirming, modifying or setting aside the order, decision or award, or, in its discretion, remanding the case to the Commission for proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing of facts, remand the cause to said Commission. Any party may appeal from the decision of the Circuit Court to the Court of Appeals. Such appeals to the Court of Appeals shall have precedence of other cases pending."

The Franklin Circuit Court was the proper authority to determine the plaintiff's right. The plaintiff then made application to the Alcoholic Beverage Control Board of the Commonwealth of Kentucky. Said Board, as indicated in plaintiff's petition, refused plaintiff a permit to transport liquor within the State of Kentucky. The Alcoholic Beverage Control Board is not permitted under the provi-



sions of the Alcoholic Beverage Control Act to issue a transporter's license to plaintiff unless plaintiff held a common carrier's certificate issued by the Department of Motor Transportation. The section of the Alcoholic Beverage Control Act which is applicable, is as follows:

"SECTION 2554b-154. No person shall become a licensee under this Act, or manufacture, sell, transport, or otherwise traffic in any alcoholic beverages, as that term is defined in this Act, who:

"(7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

The Alcoholic Beverage Control Act provides that if any person feels that the decision of the Board is improper or erroneous, he may appeal to the Franklin Circuit Court and there have his rights properly adjudicated. The section of the act so providing is section 2554b-147, which is as follows:

"Any order of the Alcoholic Beverage Board refusing a license or revoking or suspending a license may be appealed from by the applicant or licensee, as the case may be, and any order of said Board granting a license or refusing to revoke or suspend a license may be appealed from — any *any* citizen feeling himself aggrieved. The party aggrieved may, within ten days after the entry of the order with which he is dissatisfied, file in the office of the Clerk of the Franklin Circuit Court an attested copy of the order, of all the evidence heard, and of all the steps taken by the said Board relative to the order being contested, provided he shall first post a bond to secure the costs of that action in such sum as may be approved by the Circuit Court, with a corporate surety approved by the Divi-



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sion of Insurance of the Department of Business Regulation as to solvency and responsibility and authorized to transact business in this Commonwealth. The State Board and the licensee or applicant shall be necessary parties to all such appeals. The Circuit Court Clerk shall thereupon docket the case as though it were a petition in equity, and shall immediately issue a summons for said State Board, if the appeal be taken by an applicant or licensee, or a summons for said State Board and the licensee if the appeal be prosecuted by a citizen. Such summons shall be returnable in the same manner as are summonses in equity cases. If the appeal be from an order refusing to grant a license or revoking or suspending a license, it shall be the duty of the State Board, when served with such summons, or of such person as it may designate, to appear and defend the action of the State Alcoholic Beverage Board in refusing to grant or in revoking the license in question. If the appeal be from an order granting a license or refusing to revoke or suspend a license the burden of appearing and defending the action of said Board shall be upon the licensee.

"No formal pleading shall be required in such appeals, but the case shall be set down for a hearing, and such appeals shall in all respects to be expedited as are declaratory judgment suits; after such hearing the court shall enter a judgment sustaining or setting aside the order of the State Alcoholic Beverage Control Board appealed from. No new or additional evidence may be introduced in the Circuit Court except as to the fraud or misconduct of some party engaged in the administration of this Act and affecting the order appealed from, but the Circuit Court shall otherwise hear the case upon the record as attested by the Board, and shall in all respects dispose of the appeal in a summary manner, its review being limited to determining whether or not:

"(1) The Board acted without or in excess of its powers.



“(2) The order appealed from was procured by fraud.

“(3) If questions of fact are in issue, whether or not any substantial evidence supports the order appealed from.

“Any party aggrieved by a judgment of the Circuit Court may appeal to the Court of Appeals in the same manner that appeals are taken under the declaratory judgment act.

“If the appeal be from an order refusing to grant a license, or revoking or suspending a license, the costs shall be taxed against the application or licensee in any event. If the appeal be from an order granting a license or refusing to revoke or suspend a license, the costs shall be taxed against the citizen who, feeling himself aggrieved, has contested the order, in the event that the order of the Board granting the license or refusing to revoke or suspend the license, is sustained. In the event that such order is set aside with direction to the Board to refuse the license or to revoke or suspend the license, the costs shall be taxed against the licensee.

“No order granting a license shall become effective, and no license thereunder shall be issued, until the expiration of ten days after the date of the entry of such order; and if, within said period of ten days, an appeal from said order shall have been filed as provided by this section, then such order shall not become effective until said appeal shall have been finally determined.

“If a license shall be revoked or suspended by an order of the Board, the licensee shall at once suspend all business or other operations authorized under his license, except as provided in section 46 of this Act, though he may file an appeal in the Circuit Court from the order of revocation or suspension, and no court shall have authority to issue an injunction to suspend the operation of an order of revocation or suspension pending an appeal. If upon appeal to the Circuit Court an order of suspension or revocation is upheld, or



if an order refusing to suspend or revoke a license is reversed, and an appeal is taken to the Court of Appeals, no court shall have authority to issue an injunction to suspend the operation of the judgment of the Circuit Court pending the appeal."

It has been a fundamental rule in equity proceedings that an injunction will not lie where the petitioner has an adequate remedy at law. In the light of the appeal granted the petitioner from the rulings of the Director of the Motor Transportation Department and the rulings of the Alcoholic Beverage Control Board, there is an adequate and complete remedy for the plaintiff.

The State, in order to adequately control the transportation of liquor within its boundaries, has very clearly stated that liquor can only be transported by persons or corporations holding certificates to operate as common carriers. The reason for this is that common carriers operate over a designated route; consequently, the revenue officers may police this area and inspect the shipments as they pass certain points.

The restraining order granted by the Federal District Court enjoining the officers of this Court had the effect of staying a proceedings in the Franklin Circuit Court. It is our contention that this is in violation of section 379 of 28 U. S. C. A.:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Supreme Court of the United States construed this section in the case of *Boise Artesian H. & C. Water Company v. Boise City*, 213 U. S. 276, 29 Sup. Ct. Rep. 426; and



in the course of the opinion the Court used the following language:

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

In the case of *Matthews v. Rodgers*, 284 U. S. 521, 52 Sup. Ct. 217, the Court said:

"If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code, p. 237 (28 U. S. C. A., p. 344), or to his suit at law in the federal jurisdiction are present."

From the rulings in at least two decisions, it is our contention that this petitioner has a complete and adequate remedy in the State courts and if the State courts, after their jurisdiction has been revoked, decided the question and a Federal question is involved, the plaintiff may then have his relief in the Supreme Court of the United States.

Alcoholic liquors being a subject which has been placed within the exclusive control of the States by the provisions of the Twenty-first Amendment and the Webb-Kenyon Act, it is our contention that this is a matter which concerns intrastate commerce, and is a matter which should be before the State courts on appeal from the rulings of the Director



of the Motor Transportation Department and the Alcoholic  
Beverage Control Board.

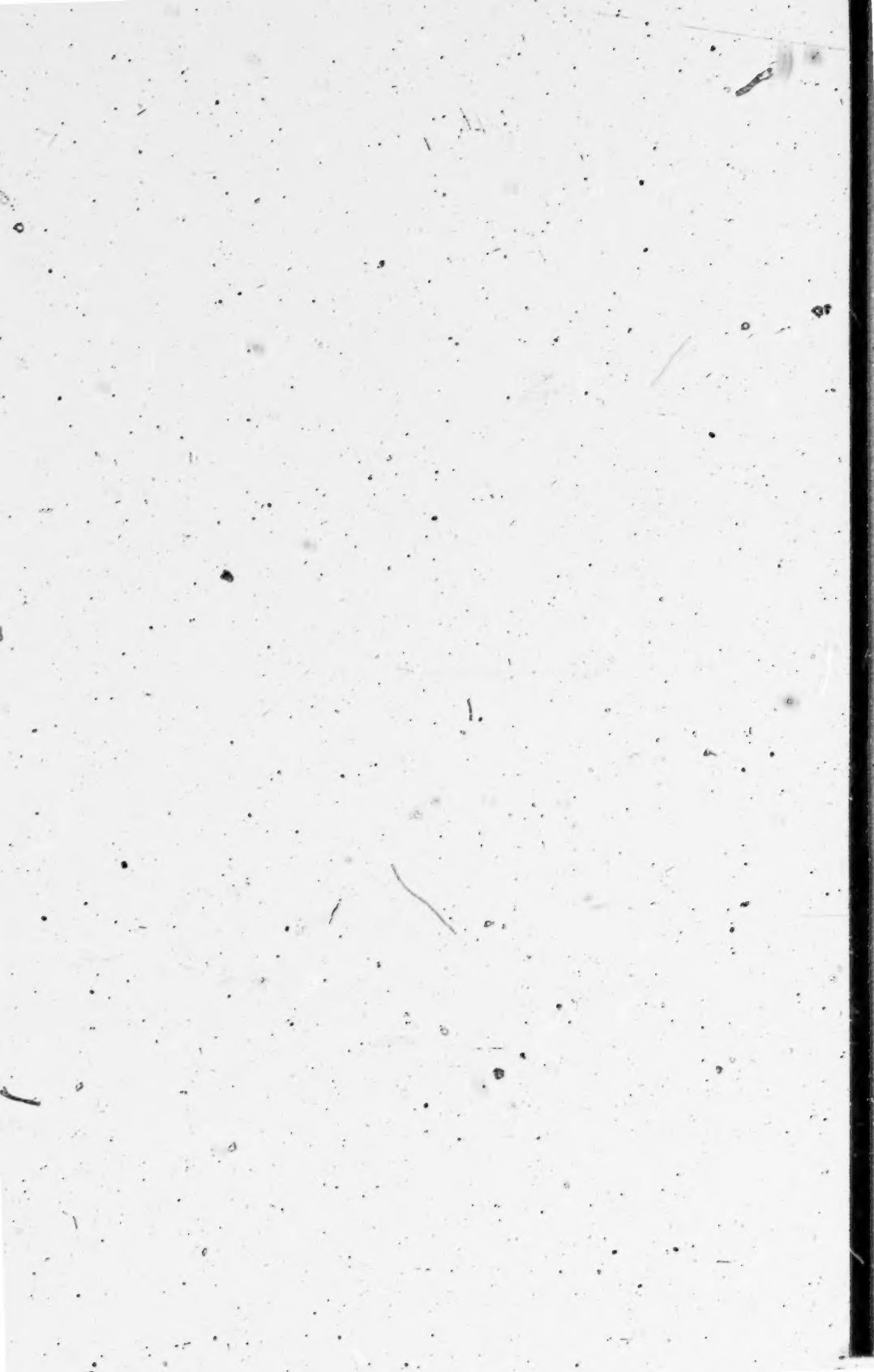
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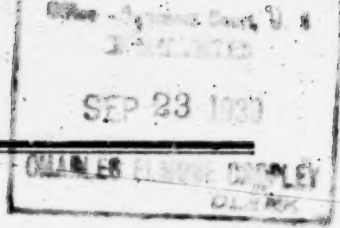












# Supreme Court of the United States

OCTOBER TERM, 1939

No. 8

ZIFFRIN, INCORPORATED - - - - Appellant,

vs.

JAMES W. MARTIN, Commissioner of  
Revenue of the Commonwealth of  
Kentucky, et al. - - - - Appellees.

## BRIEF FOR APPELLEES

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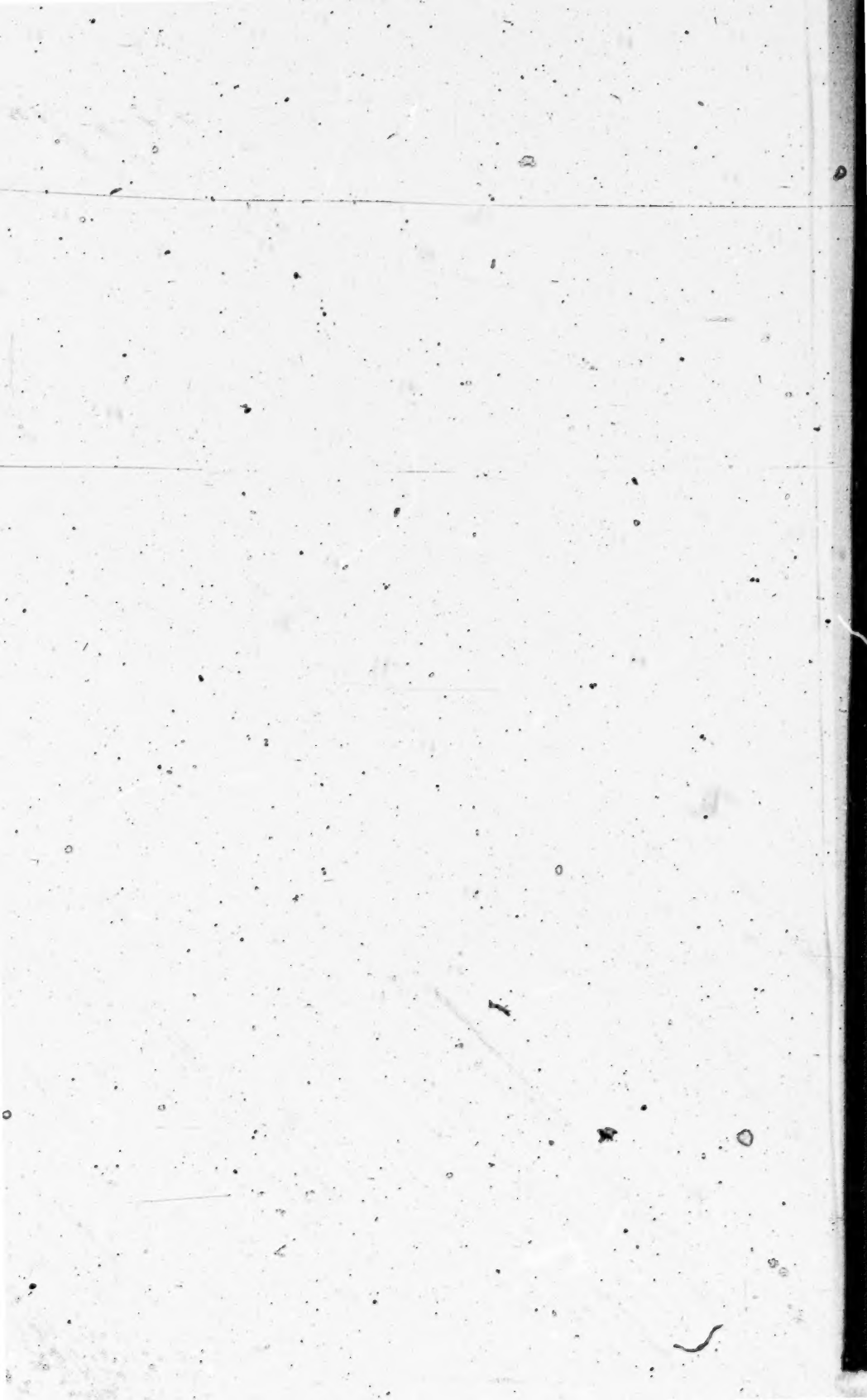
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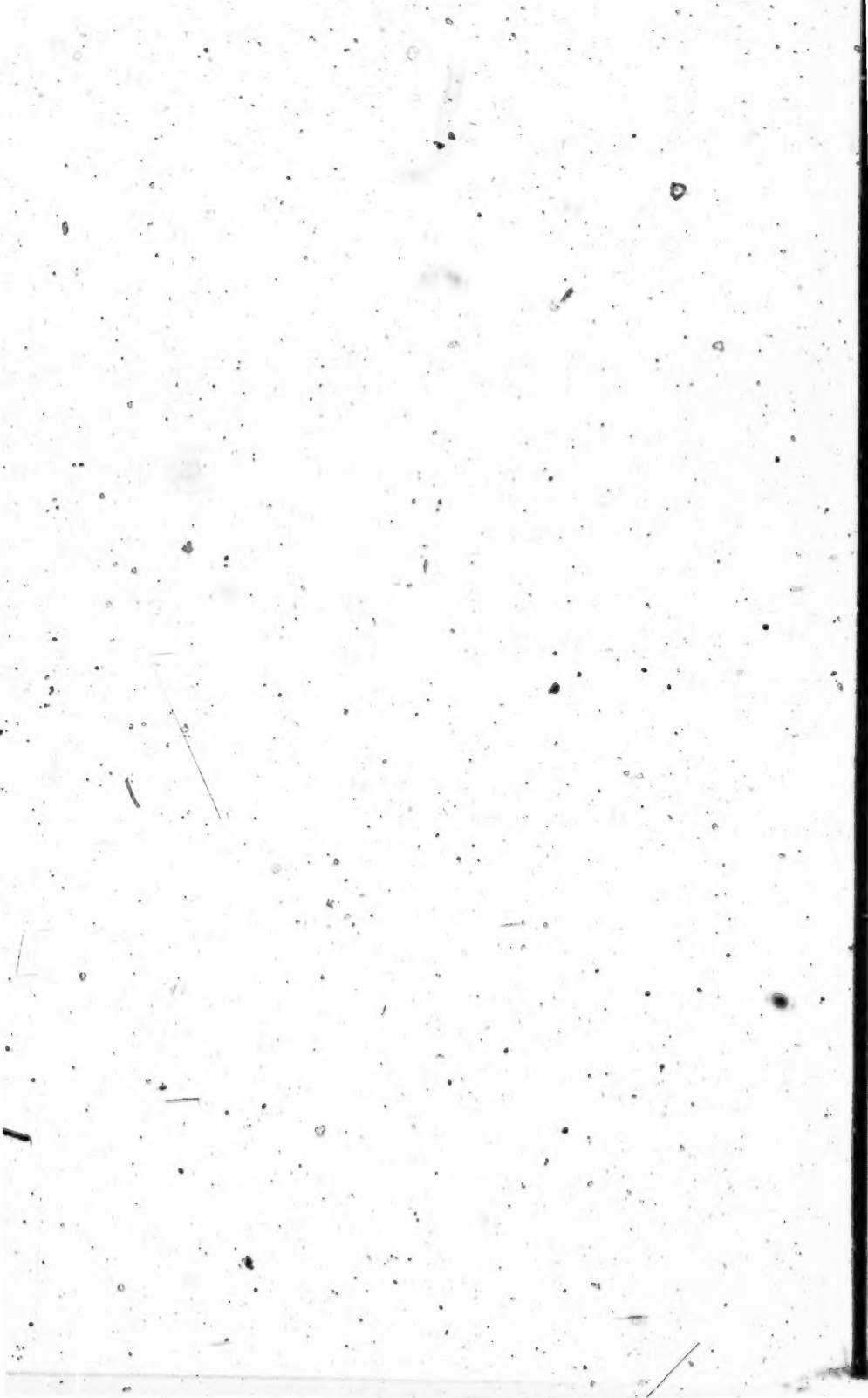
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# Supreme Court of the United States

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OCTOBER TERM, 1939

No. 8

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ZIFFRIN, Incorporated

*Appellant,*

VS.

JAMES W. MARTIN, Commissioner of Revenue  
of the Commonwealth of Kentucky, et al.

*Appellees.*

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## BRIEF FOR APPELLEES

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### Reference to Official Report of Opinion Below.

The opinion of the specially constituted Statutory Three-Judge Court, sitting as the United States District Court for the Eastern District of Kentucky, delivered below, and being the only opinion delivered by the Court below, is officially reported under the style, *Ziffrin, Inc. v. Martin, et al.*, in 24 Fed. Supp. 924.

### Grounds Upon Which Jurisdiction of This Supreme Court of the United States Is Invoked.

Jurisdiction of this Court is invoked under *Judicial Code*, §§238 and 266, *U. S. C.* Title 28, §§345 and 380, respectively, on the ground that this is a direct appeal from



the final judgment and decree of a Statutory Three-Judge Court, sitting as the District Court of the United States for the Eastern District of Kentucky (R. 65, 71), denying appellant—after notice and hearing (R. 32, 64, 65, 66)—both an interlocutory and a permanent injunction (R. 67, 68) suspending and restraining the enforcement, operation, and execution of the Kentucky Alcoholic Beverage Control Law by restraining the action of public officers of Kentucky in the enforcement and execution thereof. However, a temporary injunction pending this appeal was granted. (R. 68.)

As this Court has already overruled appellees' motion and statement opposing jurisdiction and further in view of the fact that all pertinent facts are set forth in the statement of case (immediately following), appellees beg leave to omit restating these facts in the interests of brevity.

### STATEMENT

The appellant, Ziffirin, Incorporated, an Indiana corporation, and an authorized contract carrier, comes before this Court questioning the constitutionality of certain provisions of the Alcoholic Beverage Control Law of 1938 (Baldwin's 1938 Kentucky Statute Supplement, Section 2554b-97 et seq., Acts of 1938, Chapter 2), which Act was passed by the Kentucky General Assembly in its 1938 Regular Session and became effective when signed by Governor A. B. Chandler, March 7, 1938, under an emergency clause.

It is claimed that certain provisions of said Act violate (a) the Commerce Clause, *Article 1, Section 8, Clause 3*, (b) *the due process clause of the Fourteenth Amendment*, (c) *the equal protection clause of the Fourteenth Amendment*, because these provisions prohibit all transportation to or from premises in Kentucky of more than three (3) gallons of distilled spirits or wine except by a licensee thereunder,



or a railroad or railway express company. A license to transport distilled spirits and wine by truck for hire to or from premises in Kentucky which includes the receiving of such liquors for transportation is provided, but the holding of a common carrier's certificate is a prerequisite to the issuance of such a license. It is against this provision that the appellant makes its stand.

Before quoting these questioned sections, we should first like to show the intent and purpose of this "Control Law."

The title to this Alcoholic Beverage Control Law of 1938 reads as follows:

"AN ACT providing for the regulation of the manufacture of and traffic in alcoholic beverages; requiring licenses therefor and fixing the amounts of license fees; creating Kentucky State Alcoholic Beverage Control Board, with appropriate powers for the enforcement of this Act; fixing the compensation of members of said Board and employees to be appointed by it; authorizing the issuance, revocation and suspension of licenses; imposing prohibitions, restrictions and regulations and fixing penalties for violations of this Act; empowering counties, and cities of the first, second and third classes, to have local alcoholic beverage administrators with appropriate powers to adopt and enforce restrictions and regulations of the alcoholic beverage traffic in such city or county, in conformity with this Act; to issue local licenses and fix the fees therefor, to revoke same, and to impose local regulations and penalties, not inconsistent with this Act; transferring the functions and resources of the Division of Alcoholic Control in the Department of Business Regulation to the Department of Revenue; repealing certain sections of Carroll's Kentucky Statutes, 1936 edition, and all inconsistent laws; and declaring an emergency to exist."



An examination of this Act will disclose that it is a comprehensive law designed to control alcoholic beverages from their manufacture or importation until their use or exportation.

As to intoxicating liquors, the Commonwealth of Kentucky is in rather a unique position among the various states. Kentucky's problems of control are not the same as those problems which confront other states. The official report issued by the Treasury Department of the United States shows that Kentucky produced 40.5% (41,671,416 gallons) of the whiskey manufactured in the country in the fiscal year 1938.\* In addition to that, millions of gallons of intoxicating liquors are stored in this State.† Thus Kentucky's main problem of control is not to keep whiskey from being illegally imported so much as it is to prevent the illegal diversion into illegal channels of part of this enormous stock of intoxicating liquors now within the bounds of the State. Great quantities of these liquors are transported by truck, and if that whiskey which is supposedly consigned to either domestic or out-of-state dealers happens to find its way into illegal fields in Kentucky, it utterly breaks down any measures this State has erected to protect its citizens against the evils of illegal traffic in these liquors.

Intoxicating liquors have a "Jekyll-Hyde" nature insofar as Kentucky is concerned. Nearly 50,000 people in Kentucky are directly connected with the "whiskey business," and as a consequence depend on the business for a livelihood. The General Assembly knew this and realized that to prohibit all traffic in intoxicating liquors would visit

\* Figures for 1938 showed 40.5%; 1937, 40.8%; 1936, 32.9%. *Statistics on Distilled Spirits and Rectified Spirits and Wines*, issued by the Alcohol Tax Unit, Bureau of Internal Revenue, U. S. Treasury Department.

† 192,352,572 gallons stored in internal revenue bonded warehouses June 30, 1938, *ibid.*



upon our State the worst ravages of depression. On the other side, it is well known that intoxicating liquors are the cause of much crime and delinquency. In addition to that, "hijackings" of trucks loaded with this commodity have been all too frequent in Kentucky. In some cases regular running gun battles have occurred. Then too, Kentucky has forty-eight (48) dry counties which have voted to prohibit the sale or use of such liquors within their bounds. The "business of bootlegging" with its evil consequences, must be guarded against. Kentucky has seen the terrors of uncontrolled intoxicating liquors, and it was to protect its people from these dangers that this comprehensive Act, designed to control all phases of the traffic, was passed. But of what use would be this protective Act if once these liquors were manufactured or released from storage, there was no control over the distribution thereof?

All through the day and night, trucks may be seen traveling the State's public roads. It would be an utter impossibility to police adequately all these highways to prevent transportation into these dry counties, or to prevent other illegal diversions. Without control of the distribution it would require the omnipresence of a deity to check the flow of liquor into unlicensed channels, thence to surreptitiously peddled in back alleys to minors and habitual inebriates, to be sold on the Sabbath and after the hour of midnight, all in violation of the provisions of this law.

The lower court recognized the necessity of controlling the distribution of liquors:

"It is an absurdity to say that Kentucky can control its liquor output but cannot control its distribution. The reason for one applies with triple force to the other. There are hundreds of independent trucks



operating in Kentucky under a contract carrier's license. They have no schedule, no fixed route, and no definite termini. It would be an impossibility to determine the quantity or destination, whether within or without the State of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor. Assuming that liquor, uncontrolled, is a dangerous element to the health, morals and welfare of the citizens of Kentucky, there appears no greater means by which Kentucky could mistreat her citizens than to permit the manufacture and sale of liquor, but have nothing to say about its handling while within the borders of the State."

*Ziffrin, Inc. v. Martin, et al.*, 24 Fed. Supp. 924, 932.

Nor is this the first time a court has recognized this fact:

"It is common knowledge that the successful administration of statutes prohibiting or regulating the traffic in intoxicating liquors depends on the ability of the state to enforce them; and the state's success in enforcing such laws is in direct proportion to its ability to control the transportation and delivery of the liquors. The state will have comparatively little trouble in enforcing its statutes prohibiting the manufacture, sale, and possession of illegal or bootleg liquors, if it can control their transportation and delivery; and the transportation and delivery by automobiles, motor trucks and motor vehicles constitutes the greatest difficulty."

*Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 A. 590, 597.

Also: *Clark v. State*, — Tenn. —, 113 S. W. (2d) 374.

Indeed, it was recognized by this court that automobiles and trucks constitute the major difficulty, for in *United*



*States v. Simpson*, 252 U. S. 465, 64 L. Ed. 665, 666, this Court said in speaking of the Reed Amendment:

"Had Congress intended to confine it to transportation by railroads and other common carriers, it may well be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined, it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit."

This Court has already recognized that intoxicating liquors have "well-known noxious qualities" and that their use brings about "extraordinary evils."

*Crane v. Campbell*, 245 U. S. 304, 307, 62 L. Ed. 304, 309.

There are no Federal laws covering this phase of the subject, and unless Kentucky provides for her own protection, she will be helpless before these evils flowing from this commodity.

Acts of 1938, Chapter 2, Section 93 (Section 2554b-194, Baldwin's 1938 Kentucky Statute Supplement), provides:

"No distilled spirits or wine in excess of three gallons shall be stored or kept except upon the licensed premises of a person who is the holder of a license provided for in Section 18\* or 29\*\* of this Act. (\*Sec. 2554b-114; \*\*Sec. 2554b-126.)"

The Alcoholic Beverage Control Board has interpreted this section as allowing the receipt and the transportation of, without a license, amounts of these liquors up to three gallons by a person who has legally secured these liquors and who intends their legal use. (By legal use, we mean



a use in accordance with the provisions of this Alcoholic Beverage Control Law of 1938.)

Acts of 1938, Chapter 2, Section 89 (Section 2554b-190, Baldwin's 1938 Kentucky Statute Supplement), seeks to control the method of distribution by providing:

"No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages as may be transported by the holder of any license authorized by section 18\* of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine. (\*Sec. 2554b-114.)"

The effect of these sections makes the receipt by a transporter of more than three gallons of such liquors illegal unless the receiver is a licensee or railway company or railway express company.

Acts of 1938, Chapter 2, Section 18(7) [Section 2554b-114(7), Baldwin's 1938 Kentucky Statute Supplement] provides for a:

"License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum."

And in Acts of 1938, Chapter 2, Section 27 (Section 2554b-124, Baldwin's 1938 Kentucky Statute Supplement) is provided the business authorized under a transporter's license:

"A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case



are authorized by the law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be."

Knowing that a license granted to all who applied for this license would serve as no protection against the traffic in illegal spirits, the Legislature wisely wrote in a standard with which all who wish to haul intoxicating liquors by truck over the highways to or from premises in Kentucky must comply. This standard is found in Acts of 1938, Chapter 2, Section 54(7) [Section 2554b-154(7), Baldwin's 1938 Kentucky Statute Supplement]:

"A Transporter's License as provided for in section 18\* (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier. (\* §2554b-114.)"

The purpose of requiring this standard is to reduce the job of patrolling the roads, and to provide a closer check on the transportation of these liquors. As common carriers run between definite termini, on a prescribed route, and on schedules (a contract carrier does none of these) the State would thus know the routes to patrol to prevent diversion and to protect against "hijacking."

The State, by a system of reports required of all licensees, can check rather accurately the purchases and sales of this commodity. Permits are required of distillers before making the whiskey, and these permits must state the number of gallons to be manufactured. The Federal storekeeper gauger's daily report (Form 1520), to which Kentucky officials have access, shows the actual "run." After the whiskey is placed in the warehouse, withdrawal



are entered on Federal Form 52A, and reported to Kentucky on State Form 501. When the whiskey is shipped from the warehouse, it is listed on Federal Form 52B and on State Form 501, and supplemented by unit report 503. The transporter must show where it was hauled; on State Form 503A, and receipt of the commodity by a Kentucky wholesaler will be shown on Federal Form 52A and State Form 502. But if the shipment were supposedly consigned to an out-of-state licensee, Kentucky could not always get an accurate check as to whether this whiskey in fact was received.

A common carrier has a fixed route; thus, if whiskey is reported shipped thereby, the possibilities of diversion are minimized. A diversion would require the collusion of these licensees under this system, all subject to penalties. (In addition to the system of reports, Kentucky makes audits of all licensees and checks the stock against the reports.) The Kentucky wholesaler must show his receipts of those liquors on Federal Form 52A and State Form 502, and the sales on Federal Form 52B and State Form 501, and supplemented by unit report 503. The transportation must again be shown on State Form 503A, and the State retailer receiving this merchandise must show his receipts on ~~State~~ Form 502. Again, if it were not for the control of the means of transportation, those liquors might be diverted into illegal fields. The retailer must keep an accurate list of his stock, so that his receipts may be checked against this stock. In this way, Kentucky protects against diversion.

The appellant, Ziffrin, Incorporated, is a contract carrier who has two contracts to transport intoxicating liquors manufactured in Kentucky from Louisville, Kentucky, to places situated north of the Ohio River. (R. 39, 43, 63.)



The appellant made application for a common carrier's certificate to the Kentucky Division of Motor Transportation of the Department of Business Regulations, *and was refused because appellant had not shown itself to be a common carrier. (R. 18.)* The appellant admits it made little or no effort to comply with this standard prescribed in the Act (R. 18), and so, of course, both the common carrier's certificate and the transporter's license were refused. There was no showing that a common carrier's certificate could not have been secured had appellant complied with the standards. Appellant took no appeal from this determination.

The law in question does not affect the status of appellant as a contract carrier in any manner save that if appellant wishes to receive intoxicating liquors for carriage, it must have the requisite common carrier's certificate. *This standard is the same to all; whether carriers are interstate or intrastate, there is no discrimination; every person who secures a liquor transporter's license must hold a common carrier's certificate. Every person not having this requisite will be refused.* The appellant is placed on a parity with every other person desiring to receive liquors for transportation. There has been no denial of equal protection; there is no arbitrary classification.

Nor can it be said that in any other way the appellant's business as a contract carrier is affected. Appellant may still come into Kentucky and go out unhampered carrying all freight save that Kentucky refuses to allow intoxicating liquors in the State to be received for transportation, loaded for transportation, or transported to or from premises therein by other than a licensee, railroad or railway express company.

Under this law of Kentucky, all such liquors over three gallons not in the possession of a licensee (Section 93,



Chapter 2, Acts of 1938; Section 2554b-194, Baldwin's 1938 Kentucky Statute Supplement) are illegal and contraband (Section 53, Chapter 2, Acts of 1938; Section 2554b-151, Baldwin's 1938 Kentucky Statute Supplement). Thus it is obvious that Kentucky has not seen fit to grant an absolute right in these liquors manufactured in Kentucky, but only a qualified right so long as they are to be kept within the prescribed channels.

Insofar as the record shows, the appellant only exports whiskies manufactured by two Kentucky distillers and so all questions concerning whiskies imported into the State are moot. *The sole question is whether Kentucky may regulate the receipt for distribution or the distribution (until the liquors cross the State's boundaries) of intoxicating liquors manufactured by Kentucky distillers by confining the distribution for hire to truck common carriers, railroads or railway express companies, when such liquors are considered so dangerous that no rights are allowed to be had therein unless they are to be kept in prescribed channels.*

### ARGUMENT

The argument is summarized in outline form in the Subject Index, pages i-xiv.

#### I. THE ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. The Control of the Exportation of Intoxicating Liquors Manufactured in a State is a Local Matter Which May Best be Handled by That State.

It is a rather elementary principle of *commerce clause law* that there remains to the states the exercise of the power appropriate to their territorial jurisdiction in making suitable provisions for local needs. The state may provide local improvements, create and regulate local facili-



ties and adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may be involved. See the *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511; *Townsend v. Yeomans*, 301 U. S. 441, 81 L. Ed. 1210. State laws, not primarily aimed at commerce, but intended as legitimate exertions of this authority of the state to protect the public health, morals, and safety are not invalid because they may remotely or incidentally impose restrictions on interstate commerce, *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, or indeed are valid where "interstate commerce is materially affected." *South Carolina Highway Department v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734; *Eichholz v. Public Service Comm.*, 306 U. S. 268, 83 L. Ed. (Adv. Opinions) 508.

"Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways."

*South Carolina Highway Department v. Barnwell Bros.*, 303 U. S. 177, 190, 82 L. Ed. 734, 742.

It is submitted that the restraint placed upon truck carriers by the Commonwealth of Kentucky is for the protection of local (State) welfare, safety, and morals and is not primarily aimed at interstate commerce. There is no discrimination against interstate traffic in intoxicating liquors, for all truck traffic carrying these liquors to or from premises in Kentucky, whether interstate or intrastate, is subject to these provisions. All those desiring to haul such liquors must comply with the requirements. The standard is the same for all.



It has been held that a state may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control where Congress has not acted, although the payment is requested of those engaged in interstate or foreign commerce. *Keokuk Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Cincinnati L. C. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Parkersburg & O. R. Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584. A state may adopt quarantine regulations or inspection laws. *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878; *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347; *Rasmussen v. Idaho*, 181 U. S. 198, 45 L. Ed. 820; *Compagnie Francaise & Co. v. Board of Health*, 186 U. S. 380, 46 L. Ed. 1209.

State laws have been upheld which forbade persons in that State from receiving, selling, offering, or soliciting consignments of farm products for sale on commission in said State, unless a license was obtained. *Hartford Accident & Ind. Co. v. Illinois*, 298 U. S. 155, 80 L. Ed. 1099. A statute requiring the examining and licensing of all railroad engineers, was sustained (*Nashville, Chattanooga & St. Louis Railway Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352), as was a statute forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166). Statutes regulating the heating of steam passenger cars have been upheld, although the cars were used in interstate traffic (*New York, New Haven & Hartford Railroad v. New York*, 165 U. S. 628, 41 L. Ed. 853), as have statutes requiring a "full crew" on trains running in the state. (*C., R. I. & P. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290.) Statutes outlawing contracts exempting liability of a common carrier are valid. (*C., M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688.)



Many of the above cases are cases involving railroads while the case at bar involves trucking a dangerous commodity over state highways, but trucking over the highways is even more subject to regulation according to *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734.

Other cases may be found approving statutes which surely affect commerce as directly as the statute in question. For example, a statute prohibiting healthy people either from within or without the state, entering an area inficted with a contagious disease (*Compagnie Francaise v. Board of Health*, 186 U. S. 380, 46 L. Ed. 1209); or a statute prohibiting the disenterment or exhuming of the body of a deceased person even when intended to be transported out of the state (*In re Wong Yung Qui*, 2 Fed. 624); or a prohibition of the slaughter of calves unless in healthy condition and at least four weeks old, and a prohibition of the shipment of veal from such animals (*People v. Bishop*, 89 N. Y. S. 709); or an ordinance prohibiting the trucking of certain quantities of gasoline over the city streets (*Ash v. Gibson*, 145 Kans. 825, 67 P. (2d) 1101). Indeed, a Washington statute regulating motor driven tugboats, including those used in interstate commerce was declared valid. (*Kelly v. Washington*, 302 U. S. 1, 82 L. Ed. 3, opinion by Mr. Chief Justice Hughes.) Maryland's law regulating the importation of anthracite coal by truck was held not such a burden on interstate commerce as to be invalid (*Yager v. State*, — Md. —, 200 Atl. 731), likewise Tennessee's law limiting the exportation of intoxicating liquors to shipment by common carriers or the manufacturer (*Clark v. State*, — Tenn. —, 113 S. W. (2d) 374). Nor was Pennsylvania's law which limited the transportation of such liquors to those licensed to transport them considered such a burden. (*Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 Atl. 590.) A Florida law requiring the inspection of naval



stores before exportation was held valid. (*Jackson v. Cravens*, 235 Fed. 212.) Indiana's law limiting the transportation of dead animals to those licensed to carry them, and prohibiting all exportation was held valid by this Court (*Clason v. Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599), as was Florida's statute which prohibited the shipment of unripe citrus fruits out of the State (*Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835).

### **B. Congress Has Not Occupied the Field.**

If it be conceded that Congress may occupy the field of the transportation of intoxicating liquors over the highways, still until it be clearly shown that Congress has evidenced such an intent and has actually occupied the field, the State may regulate. (*Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108; *M., K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 58 L. Ed. 1377; *Kelly v. Washington*, 302 U. S. 1, 82 L. Ed. 3.)

Appellant contends that the Motor Carrier Act of 1935, Knox Act, Federal Alcoholic Administration Act, and Liquor Enforcement Act of 1936 cover the field. We will examine these Acts separately and show that they do not.

First, the Motor Carrier Act of 1935. This Act states the duties imposed on the Federal government, as regards contract carriers (of which appellant is one) to be:

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

(49 U. S. C. A., Section 304; 49 Stat. 546.)



In Section 302, we find the declaration of policy:

"It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in such transportation and among such carriers in the public interest; promote adequate economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages and unfair or destructive competitive practices; improve the relations between and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several states and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this chapter."

(49 U. S. C. A., Section 302; 49 Stat. 543.)

*In no place in this Act is it indicated that Congress intended that this Act should cover the patrolling of the roads.* Hence this is still a matter for the States to regulate for their protection and the States still have the power to make laws to simplify the patrolling of the roads.

*In no place in this Act is it indicated that Congress intended that this Act should undertake to correct certain hazards created by the moving of certain commodities over the road:* This Court has already said that where an article being moved across the State creates a hazard that the State may exercise its power to make special provisions for the inspection and policing thereof. *Morf v. Bingaman*, 298 U. S. 407, 80 L. Ed 1245. Surely the dangers incident to "hijacking" and "bootlegging" which we have already pointed out may be minimized by protective legislation.



*In no place in this Act is it indicated that Congress intended that the Act prescribe for the hauling of inherently dangerous commodities which a State considers should not be freely transported.* The case of *Clason v. Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599, was decided subsequent to the passage of this Act, but no mention was made of this Act preempting the field.

Cannot a State also prescribe how other commodities considered by that State to be dangerous, should be hauled? If whiskey is hauled by anyone who wishes, will not some of this whiskey be sold to persons who are not authorized to handle this commodity and then in turn be peddled to minors and inebriates as well as sold in Kentucky's 48 dry counties? The same danger is not present in shipments by rail. Unless a State may control the movements of liquor over her roads, a breakdown of all regulation of this dangerous commodity must inevitably follow.

*In no place in this Act is it indicated that Congress intended that this Act should cover the prescribing of the roads which a carrier may use.*

In the case of *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92, 77 L. Ed. 1053, 1056, an interstate carrier was refused the right to use a certain route and it was not apparent that there was any alternative route which might be used. The Court said:

"The commerce clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety."

Appellant dwells long on the fact that the word "property" includes intoxicating liquors, and that as the Motor Carrier Act of 1935 deals with the transportation of property, hence Congress has preempted the field. To this



we submit that another Act of Congress giving railroads the authority to carry *freight and property* from one state to another did not authorize the shipment of diseased cattle into a state in derogation of that state's law. *M., K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878. Likewise, it seems the transportation of a commodity considered dangerous is not covered in the Motor Carrier Act of 1935, and hence may not be done in derogation of the state's law. Secondly, intoxicating liquor is a commodity in which a person has only such property rights as the state sees fit to grant. (*Samuels v. McCurdy*, 267 U. S. 188, 69 L. Ed. 568.) As Kentucky has said that liquor may only be manufactured and trafficked in in Kentucky according to her laws, one of which is that it shall only be transported by a licensee under this Act in question, or a railroad or railway express company, there is no property right in such liquor transported in any other fashion and hence it is not property within the meaning of the Motor Carrier Act of 1935.

#### Second, The Knox Act.

The Knox Act (18 U. S. C. A., Section 390) requires that "any package of or package containing any spirituous, vinous, malt or other fermented liquor, or any compound containing any spirituous, vinous, malt, or other fermented liquor fit for use for beverage purposes, 'to be shipped between states must be labeled on the outside cover' as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein."

Appellees submit that this Act cannot be considered as showing that Congress intended to preempt the field regulating the transportation by motor truck of this noxious commodity. All this statute does is require that packages be labeled. In no way does it limit the transportation.



In *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, this Court found that the Federal Food and Drug Act relating to shipments in interstate commerce of fruit in filthy, decomposed, or putrid condition did not so preempt the field that a Florida statute making it a criminal offense to deliver for shipment, or to ship, in interstate commerce citrus fruits which were immature and unfit for consumption would be invalid.

Third, the Federal Alcoholic Administration Act (27 U. S. C. A., Section 201, et seq.).

Clearly this Act has nothing whatever to do with the transportation of these noxious commodities. The only pertinent provisions deal with the requirement that the products must be bottled, packaged, and labeled in conformity with the rules and regulations prescribed by the Federal Alcoholic Administrator before being sold or delivered for shipment or shipped in interstate or foreign commerce.

Fourth, The Liquor Enforcement Act of 1936 (27 U. S. C. A., Section 221, et seq.).

This Act deals solely with the importation into "dry" states. There is no shown intent to deal with the channelization of motor traffic in intoxicating liquors to prevent that which is supposedly on its way to an out-of-state dealer actually being diverted into illegal fields in the state of its manufacture.

Clearly then, we have a commodity recognized to have noxious qualities, whose use produces well known evils, a commodity recognized by its nature to be peculiarly subject to the police power. As was said by the lower court:

"It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce, and must be regulated by some authority. There is no federal



regulation. There is no Act of Congress prescribing the method or agency through which it may be transported over the highways or right-of-ways within the borders of the state. The lack of national legislative control is conspicuous."

*Ziffrin, Inc. v. Martin*, 24 Fed. Supp. 924, 931.

- C. The State Having the Power to Prohibit the Manufacture or Sale or Transportation for Exportation of Certain Commodities Manufactured, Grown, or Developed Therein when Such Commodities are Considered by the State to be Dangerous to Health, Morals, or Safety, Surely has the Lesser Authority to Regulate.

It is the contention of the Commonwealth of Kentucky that as a sovereign state, it may prohibit the manufacture or sale (*Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346) or transportation for exportation (*Clason v. Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599) of certain commodities manufactured, grown, or developed therein when such commodities are considered by the state to be inherently dangerous to health, morals or safety, if uncontrolled.

Having the authority to prohibit, the State certainly has the lesser authority to regulate (*Seaboard Air Line v. North Carolina*, 245 U. S. 298, 62 L. Ed. 299; *State Board of Equalization v. Young's Market*, 299 U. S. 59, 81 L. Ed. 38; *Eberle v. Michigan*, 232 U. S. 700, 58 L. Ed. 803) ~~such~~ <sup>products</sup> dangerous to health, morals, or safety, if uncontrolled.

In the case of *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, an Iowa statute which limited the manufacture or sale of intoxicating liquors to the manufacture or sale within the state for mechanical, medicinal, culinary, and sacramental purposes, but for no other use—not even for the purpose of transportation beyond the limits of the state—was



under consideration. In the opinion Mr. Justice Lamar stated:

"We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacturing of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer intends to export the liquors when made? Does this statute in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?"

"These questions are well answered in the language of the court in the *License Tax Cases*. 72 U. S. 5 Wall. 470 (18:500) 'Over this commerce and trade (the internal commerce and domestic trade of the States), Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject'. The manufacture of intoxicating liquors in a State is none the less a business within that State because the manufacturer intends at his convenience, to export such liquors to foreign countries or to other States."

128 U. S. 1, 23, 32 L. Ed. 346, 351.

Clearly then, this case established the doctrine that a State may limit intoxicating liquors manufactured therein so that none may be exported therefrom.

Upon examination of the case of *Kidd v. Pearson*, supra, it will be found that the same argument advanced



by appellant in the present controversy was considered and expressly disapproved. The plaintiff in error, J. S. Kidd, argued that intoxicating liquors were property, that traffic in them was within the term "commerce" of the Constitution, and that exports and imports stood upon precisely the same footing (prior to the Wilson, Webb-Kenyon, or Reed Acts, or the Twenty-first Amendment).

"To support the affirmative, the plaintiff in error maintains that alcohol is, in itself, a useful commodity, not necessarily noxious, and is a subject of property; that the very statute under consideration, by various provisions, and especially by those which permit, in express terms, the manufacture of intoxicating liquors for mechanical, medicinal, culinary or sacramental purposes, recognizes those qualities and expressly authorizes the manufacture; that the manufacture being thus legalized, alcohol not being per se a nuisance, but recognized as property and the subject of lawful commerce, the State had no power to prohibit the manufacture of it for foreign sales.

"The main vice in this argument consists in the unqualified assumption that the statute legalizes the manufacture. The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence. It is a grave error to say that the statute 'expressly authorized' the manufacture for it did not: . . ."

• 128 U. S. 1, 18, 32 L. Ed. 246, 349.

It is likewise true that the Kentucky Statute did not give an unqualified right to manufacture intoxicating liquors but only a right to manufacture and traffic therein in accordance with the law in question.



The licenses issued to all distillers contained the following provision:

"The above named licensee is hereby authorized, pursuant to the Alcoholic Beverage Control Law of 1938, to engage in the business of a vintner, distiller, rectifier or blender, as provided by this license and as defined in the Alcoholic Beverage Control Law of 1938, during the period of this license and subject to the laws, rules and regulations of the Commonwealth of Kentucky and local governmental units relating to alcoholic beverages."

(A similar provision was placed in every other type of license.)

Each distiller was only given a qualified right to manufacture alcoholic beverages. The right to manufacture was subject to the laws of the Commonwealth of Kentucky. One of the laws of the Commonwealth of Kentucky states how their manufactured product may be distributed. Thus if they manufacture intoxicating liquors and attempt to distribute them by another method, the distiller is subject to having his license revoked.

A similar provision may be found in each license issued during 1938-1939 and during the present license year 1939-1940.

In 1896, eight years after this Court decided *Kidd v. Pearson*, another case presented an opportunity for the court to extend the principle that the right to prohibit the manufacture of the product necessarily carries with it the right to prevent its export. This case was *Geer v. Connecticut*, 161 U. S. 519; 40 L. Ed. 793, wherein was involved a Connecticut Statute which provided that no person should kill certain named wild game for the purpose of conveying same beyond the limits of the State or should transport or have in possession with intention to procure the transporta-



tion beyond said limits. Mr. Justice White in writing the opinion which held the statute constitutional under the Commerce Clause said:

"The fact that internal commerce may be distinct from interstate commerce destroys the whole theory upon which the argument of the plaintiff in error proceeds. *The power of the state to control the killing of and ownership in game being admitted, the commerce in game which the state law permitted was necessarily only internal commerce since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it.* All ownership in game killed within the state came under this condition which the state had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the state consenting that such contracts be made provided only they were confined to internal and did not extend to external commerce.

"*The case in this respect is identical with Kidd v. Pearson, 128 U. S. 1.*"

(Emphasis ours.)

161 U. S. 519, 532, 40 L. Ed. 793, 798.

And in *Geer v. Connecticut*, supra, we also find the Court expressly disapproving an argument similar to that presented by the appellant in this case.

"So here the argument of the plaintiff in error substantially asserts that the state statute gives an unqualified right to kill game, when in fact it is only given upon the condition that the game killed be not transported beyond the state limits. It was upon this power of the state to qualify and restrict the ownership in game killed within its limits that the court below rested its conclusion and similar views have been expressed by the courts of last resort of several of the states."

161 U. S. 519, 532, 40 L. Ed. 793, 798.



Likewise as we have already pointed out, "Kentucky did not give an unqualified right to manufacture or sell intoxicating liquors. All that was given to the manufacturer was a qualified privilege and one of the qualifications was that they would carry on their business in accordance with the laws of Kentucky, one of which laws channelizes the transportation of alcoholic liquors to prevent their diversion to illicit fields. Thus this Act also affects the product before it begins to move in commerce of any kind.

Then twenty years after writing the *Kidd v. Pearson* opinion and eight years after deciding *Geer v. Connecticut* this court again had occasion, in another case, to follow this same doctrine. That case, *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. Ed. 828, arose from the questioning of the constitutionality of a New Jersey statute which prohibited a riparian owner from diverting the water of a New Jersey stream into any other state. Mr. Justice Holmes, in writing the opinion which held the statute valid, based his opinion upon *Geer v. Connecticut*, *supra*, a case which was held "identical" with *Kidd v. Pearson*, *supra*. In the opinion the following assertion may be found:

"A man cannot acquire a right to property by his desire to use it in commerce among the states. *Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by Geer v. Connecticut.*"

(Emphasis ours.)

209 U. S. 349, 357, 52 L. Ed. 828, 832.

—If Mr. Justice Holmes based his opinion on *Geer v. Connecticut*, *supra*, which in turn was based on *Kidd v. Pearson*, *supra*, a case which prohibited the exportation from a state of intoxicating liquors manufactured therein, the rule laid down in *Hudson County Water Co. v.*



*McCarter* must be applicable as well to a case in which intoxicating liquors manufactured in a state are being controlled prior to their crossing the border of that state in which they were manufactured.

Again in 1915, we find this court deciding a case which stemmed from the seeds of *Kidd v. Pearson*, supra. In that case, *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, can be found an extension of the *Kidd v. Pearson* doctrine. A Florida statute which prohibited the sale, shipping, or delivering for shipment of any citrus fruits which were unripe or otherwise unfit for consumption was attacked as unconstitutional under the Commerce Clause. Mr. Justice Day in writing the opinion and citing *Geer v. Connecticut*, supra, as authority, held that that statute was not a regulation of interstate commerce.

*Sligh v. Kirkwood*, supra, extends the doctrine of *Kidd v. Pearson*, in two directions. First, it will be noted that there was not a prohibition of the shipping of all citrus fruits grown in the state, but instead a prohibition of the shipping of part of the crop.

Second, and more important, it will be noted that the prohibition was not as to the growing of the fruit or the picking of the fruit which may be likened to the manufacturing of intoxicating liquors; indeed, what the court approved went one step further, the prohibition of the shipping of these fruits after they were grown and picked.

Working on the already mentioned premise that this case was based on *Geer v. Connecticut*, supra, a case held "identical" with *Kidd v. Pearson*, which dealt with the prohibition of the manufacture of intoxicating liquors for export, it follows that Kentucky could have prohibited not only the manufacture of intoxicating liquors but could have prohibited the shipping of alcoholic liquors manufactured in the state.



One statement from the case deserves particular mention at this point:

"Nor does it make any difference that such regulations incidentally affect interstate commerce when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state."

237 U. S. 52, 60, 59 L. Ed. 835, 838.

What could be more protection to Kentucky than a comprehensive law designed to channelize the traffic in intoxicating liquors to prevent these liquors from destroying the morals of our youth, the ties of our family, and the health and safety of our people?

Counsel for appellant attempt to distinguish this case by saying that it involved unsound and unwholesome food-stuffs and hence it was competent to regulate the commerce in such noxious substances. This court has often recognized that intoxicating liquors destroy the morals of a people. *Can it be that health may be protected when morals may not?*

Less than a year ago, this Court added the latest descendant of the *Kidd v. Pearson* doctrine. In the case of *Clason v. Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599, an Indiana statute which prohibited the transportation without a license of dead animals not slaughtered for food was questioned as being in conflict with the Commerce Clause.

This court held that a state might allow the transportation within the state of dead animals not killed for food purposes but prohibit the exportation thereof. Mr. Justice McReynolds in writing the opinion cited as authority that such an act was constitutional, the case of *Sligh v. Kirkwood*, supra. We have already shown that *Sligh v. Kirk-*



wood was based on *Geer v. Connecticut*, supra, which in turn was based on *Kidd v. Pearson*, supra, a case which involved the prohibition of the manufacture of intoxicating liquors for exportation.

Obviously, if this case is based on a case, which in turn was based on a case involving the prohibition of the manufacture for exportation of intoxicating liquors, this case's holding will also apply to intoxicating liquors.

A quotation from Mr. Justice McReynolds' opinion will also show that the same argument advanced by counsel for appellant in the present controversy was considered and disapproved.

"Here, contrary to what seems to be the insistence of counsel, the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant, there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils."

In the present case, contrary to the contentions of counsel for appellant, intoxicating liquors manufactured in this state are not allowed to be unqualifiedly trafficked in. Indeed, no one may manufacture, wholesale, transport, or receive for transportation, or retail such liquors unless they have shown that they have the requirements prescribed in the Alcoholic Beverage Control Law of 1938 (Sections 2554b-98 to 2554b-222, Baldwin's 1938 Kentucky Statute Supplement); and have secured a license thereunder. No such liquor may be sold to minors or habitual inebriates, nor may sales be made on Sundays or after midnight or at



all in any of Kentucky's 48 dry counties. Thus the obvious purpose of this comprehensive law is to protect Kentuckians "against obvious evils" which may arise from an uncontrolled flood of liquors.

Before a manufacturer may manufacture intoxicating liquors in Kentucky, he must be licensed. A licensed manufacturer may only sell to a licensed wholesaler, or other licensed person authorized by the State of his residence to operate. Likewise a licensed wholesaler may only sell to a licensed retailer or other licensed person authorized by the State of his residence. A licensed retailer can only sell to certain persons, and may not sell to minors, habitual inebriates, or persons whose families are poverty stricken. Also, the amount of liquor any one person may have is strictly limited.

In order to insure this system of allowing bonded licensees to handle these liquors, the Kentucky General Assembly also provided for a license to transport, the effect of which also regulated the receipt for transportation. This was all one "comprehensive scheme . . . to protect against obvious evils." (*Crane v. Campbell*, supra.)

Appellant's counsel attempt to distinguish *Sligh v. Kirkwood*, supra; and *Clason v. Indiana*, supra, from the case at bar by saying that in those cases were involved products deleterious to health. Our answer to this is two-fold: *First*, we ask this court to consider whether intoxicating liquors are anything other than deleterious to health. *Second*, intoxicating liquors are known to undermine the morals of the community, and unripe grapefruit and dead horses are not known to have such an effect. Can it be that a state may protect itself against a deleterious food stuff, but not against a contributor to the delinquency of its youth? Of course this Court cannot put the protection of health on a different plane from the protection of



morals. Yet to distinguish these cases from the controversy at bar would be to do that very thing.

As we have pointed out, this Court has already recognized that intoxicating liquors have well known noxious qualities and that their use brings about "extraordinary evils." (Mr. Justice McReynolds, in *Crane v. Campbell*, 245 U. S. 304, 62 L. Ed. 304.)

This Court has never confined the doctrine of *Sligh v. Kirkwood* to unhealthy commodities, and it is worth noting that Justices Holmes and Brandeis did not consider this doctrine of that case to be confined solely to commodities deleterious to health. See dissenting opinion in *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. Ed. 1117.

So we find that this Court has, in at least five cases beginning with *Kidd v. Pearson*, supra; and continuing with *Geer v. Connecticut*, supra; *Hudson County Water Co. v. McCarter*, supra; *Sligh v. Kirkwood*, supra; and *Clason v. Indiana*, supra, adhered to the doctrine that *a state may prohibit the exportation of a commodity which the State has allowed to be trafficked in for domestic purposes.*

All these cases are kin. Each of the later cases, as we have shown, relies on *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, as its ultimate authority. In each of the cases, it was determined that as the state had the power of prohibiting the "making" or "taking" of the commodity, the state thus had the right of forbidding the exportation of the commodity.

In two of these cases, the Court went one step further and approved statutes which prohibited the transportation of certain commodities after they were "taken."



In one of these cases, instead of prohibiting all transportation of a commodity, it was prohibited to all save those licensed therefor—and this Court held the statute valid.

Likewise in Kentucky the transportation over the road of intoxicating liquors to or from Kentucky premises is prohibited to all save those who are licensed to transport them.

This Court having recognized the power of the State to prohibit the exportation of that which the State has the absolute right to forbid the traffic in, it necessarily follows that the power to prohibit all transportation or exportation includes the lesser power of channelizing the traffic for the protection of the state. At least three State Supreme Courts have approved this doctrine. *Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 Atl. 590; *Jefferson County Distilling Co. v. Clifton*, 249 Ky. 815, 61 S. W. (2d) 645, 88 A. L. R. 1361; *Clark v. State*, — Tenn. —, 113 S. W. (2d) 374.

Moreover this Court in the case of *Seaboard Air Line v. North Carolina*, 245 U. S. 298, 62 L. Ed. 299, approved a similar doctrine for the importation of intoxicating liquors. The opinion writer, Mr. Justice McReynolds, stated:

“The challenged act instead of interposing an absolute bar against all shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. *The greater power includes the less.*”

(Emphasis ours.)

245 U. S. 298, 304, 62 L. Ed. 299, 304.



To like effect Mr. Justice Brandeis wrote in *State Board of Equalization v. Young's Market*, 299 U. S. 59, 63, 81 L. Ed. 38, 41:

"Surely the State may adopt a lesser degree of regulation than total prohibition."

As said by Mr. Justice Holmes, in *Rippey v. Texas*, 193 U. S. 504, 509, 48 L. Ed. 767, 769:

"But the State has power to prohibit the sale of intoxicating liquors altogether if it sees fit, *Mugler v. Kansas*, 123 U. S. 623, and that being so, it has power to prohibit it conditionally."

This Court has often stated that:

"The right to absolutely exclude all right to use, necessarily includes the authority, to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

*Davis v. Mass.*, 167 U. S. 43, 48; 42 L. Ed. 71, 72, and see: *Title Co. v. Wilcox Bldg. Corp.*, 302 U. S. 120, 82 L. Ed. 147; *Packard v. Banton*, 264 U. S. 140, 68 L. Ed. 596; *Eberle v. Michigan*, 232 U. S. 700, 58 L. Ed. 803.

So if the state has the power to prohibit all manufacturing for exportation, *Kidd v. Pearson*, supra, or all transportation for exportation, *Clason v. Indiana*, supra, the state may adopt a lesser degree than total prohibition. "The greater power includes the less." *Seaboard Air Line v. North Carolina*, supra.

Instead of prohibiting all manufacture of these liquors in Kentucky (*Mugler v. Kansas*, 123 U. S. 623; 31 L. Ed. 205) all sales (*Rippey v. Texas*, supra) and all transportation for exportation (*Sligh v. Kirkwood*, supra; *Clason v. Indiana*, supra) the state surely could relax this prohibition



to allow the manufacturing, selling, or transportation for exportation which complies with the standards set forth in the law.

In Kentucky intoxicating liquors do not become a legitimate subject of sale or commerce by the licensee unless shipped or transported by a person so authorized by the State. Witness what the Kentucky Court of Appeals has said:

"It is argued however, that to prohibit the transportation for sale for beverage purposes, where such sales are lawful, whisky now stored, or which may be hereafter stored in Kentucky, regardless of whether such whisky was manufactured for other than beverage use, would be to interfere with interstate commerce, and that hence the lower court erred in answering the second question in the negative. The case of *State v. Peet*, 80 Vt. 449, 68 A. 661, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998, is relied upon. The argument overlooks the fundamental proposition that the whisky stored and to be stored and on which transportation is sought was and is to be manufactured for one or more of certain specific purposes, to wit, sacramental, medicinal, scientific, or mechanical. The state could have forbidden the manufacture of the whisky for any purpose, though to be used outside of the state, and such prohibition would not have violated any constitutional provisions as to regulation of interstate commerce. *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. This being true, it could relax the prohibition as to certain excepted uses, retaining in full vigor the prohibition as to other cases. Having manufactured for the excepted uses, the appellant may not divert the article so manufactured to other uses and then invoke the commerce clause of the Federal Constitution to shield it in its transportation of that liquor for such other uses. The appellant secures the right to manufacture because of the use to which it proposes to devote the liquor. To hold it to its proposal after



the liquor is manufactured violates no part of the commerce clause of the Federal Constitution."

*Jefferson County Distilling Co. v. Clifton*, 249 Ky. 815, 61 S. W. (2d) 645, 647.

Thus it is clear that the Kentucky Court of Appeals felt that a distiller might only manufacture whiskey because given permission by the State; likewise a person may only lawfully ship the commodity when given permission by the State and only under the conditions laid down by the State. By accepting a license under the Alcoholic Beverage Control Law of 1938, the distillers and other licensees have agreed to ship only by those authorized to have this commodity:

"Under our statutes, liquor manufactured in this State does not become the subject of legal commerce or transportation for delivery either without or within the State—either interstate commerce or intrastate commerce—unless or until it is loaded for delivery on a vehicle authorized by law, to transport and deliver it."

*Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 A. 590, 598, 110 A. L. R. 919.


The same statement is applicable to the Kentucky situation.

We also wish to call attention to the following paragraph from *Clark v. State*, — Tenn. —, 113 S. W. (2d) 374, 381:

"It is suggested that the transportation of liquors, by the manufacturer or common carrier, from a county voting for manufacture, across counties not voting for manufacture, as allowed by the act, makes that not a crime by the manufacturer or common carrier which is a crime for all others. The Legislature could have, of course, repealed all laws with reference to the pro-



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hibition of the transportation of liquor. Having that right, the power to prohibit it conditionally must exist. The regulation that the transportation must be by the manufacturer or common carrier is an incident to the right of manufacture under the act. The manufacture being allowable only for sale without the State, provision for the transportation of the liquor was a necessity. Such transportation would be interstate commerce. Such regulation is reasonable in that the act confines transportation from the place of manufacture to points outside the State to recognized and responsible agencies, and prevents the transportation of liquor by all others, which the Legislature evidently regarded as a possible course of infraction of the liquor laws. No person has the inherent right to transport intoxicating liquor and the limiting of this right, under the conditions set out in the act to the manufacturer or common carrier, cannot be said to be an arbitrary classification. Code § 6619, for instance, prohibits the possession of opium, etc., but by paragraph "h," the prohibition does not apply to common carriers."

Can it be doubted that the State might have established a state monopoly of the manufacture and sale of intoxicating liquors and thus have limited the exportation solely to this monopoly? See *State Board of Equalization v. Young's Market*, 299 U.S. 59, 81 L. Ed. 38. Likewise does it not follow that the state might have established a monopoly on just the sales, wholesale and retail, allowing such liquors to be manufactured within the state, provided all the products be marketed through this monopoly? Look to this statement by Mr. Justice Brandeis in *State Board of Equalization v. Young's Market*, supra:

"Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the



manufacture and sale of beer and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare *Slaughter House Cases*, 16 Wall. 36; *Vance v. W. A. Vandercook Co.* (No. 1) 170 U. S. 438, 447. There is no basis for holding that it may prohibit or so limit importation only if it establishes monopoly of the liquor trade."

299 U. S. 59, 63, 81 L. Ed. 38, 41.

As the Constitution expressly prohibits taxes or duties on exports, a state could not place an impost on exports but except for this one distinction, the above statement of Mr. Justice Brandeis might be made applicable to the present controversy by substituting the word "exportation" for "importation" and "consignor" for "consignee."

This Court has for 50 years held that a state might in effect prohibit all exportation of intoxicating liquors. (*Kidd v. Pearson*, supra.) The Webb-Kenyon Act was required to give to a state the power to prohibit their importation, but now both the importation and exportation of such liquors are subject to total prohibition. Hence the reasoning of Mr. Justice Brandeis should apply with equal force to exports. And if the same reasoning apply, then "there is no basis for holding that it may prohibit or so limit the exportation only if it establishes a monopoly of the liquor trade."

**D. The Statute in Question Making the Receipt by an Unauthorized Carrier Illegal Thus Affects the Product before It Begins to Move in Commerce of Any Kind.**

It is the further contention of the appellees that these statutes (Section 93, Chapter 2, Acts of 1938 and Section 89+ thereof) affect intoxicating liquors manufactured in this

\* Quoted on page 7.

† Quoted on page 8.



state before they have begun to move in commerce of any kind because in reading these two sections together it is apparent that the receipt as well as the transportation itself, by an unlicensed trucker of more than three gallons of such liquors is illegal.

The lower court determined that:

"It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce and must be regulated by some authority."

The language of the Pennsylvania Supreme Court may be quoted at this point:

"Under our statutes liquor manufactured in this state does not become the subject of legal commerce or transportation for delivery within or without the state—either interstate commerce or intrastate commerce—unless or until it is loaded for delivery on a vehicle authorized by law to transport and deliver it."

*Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191A, 590, 598.

It has already been determined by this Court that interstate commerce begins when a legitimate article of interstate commerce is "delivered to a carrier for transportation." *Texas Etc. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 61 L. Ed. 578. (Indeed appellant admits this fact in his brief, page 99.) As a legal receipt is necessary to a valid delivery, it follows that in making the receipt by an unlicensed trucker of more than three gallons unlawful, this statute takes effect before the movement in interstate commerce in the same manner as did the statutes involved in *Kidd v. Pearson*, *supra*, and *Sligh v. Kirkwood* (discussed *supra*),



where the Court upheld a statute making it a criminal offense to *deliver for shipment* in interstate commerce citrus fruits immature and unfit for consumption.

This Court in those cases has already determined that when a state declares certain articles harmful and prohibits their "delivery to a carrier" such a statute is valid. The same point is now before this court for as we have pointed out, Kentucky has declared that receipt by a trucker not authorized to transport more than three gallons of these liquors is illegal. *Clason v. Indiana*, supra, is more exactly in point because receipt by other than an authorized transporter was there prohibited but a licensee was allowed to haul the commodity.

Appellant attempts to combat this argument by quoting the case of *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 58, 66 L. Ed. 458, 464, insofar as it says:

"Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

We wish to point out to the Court three vital distinctions between this case and the controversy at bar. First, the product in question there was harmless wheat as compared in this controversy with a subject which this Court has determined as "noxious" and as producing "evil consequences." Second, we wish to quote further from this case wherein Mr. Justice Day stated:

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define a line between State and Federal authority under facts presented, and require a



definition of interstate commerce where the right of State taxation was involved, or manufacture . . ."

258 U. S. 50, 55, 66 L. Ed. 458, 462.

Both of these distinguishing points are involved in the present controversy because the intoxicating liquors in question are manufactured in Kentucky in like manner as the whiskey involved in the case of *Kidd v. Pearson* was manufactured in Iowa, and also like Iowa, Kentucky has not given an unqualified right to traffic therein. On the other hand, harmless wheat is a product which has no known "noxious qualities," produces no "evil consequences," and there is no reason why a state should not give the unqualified right to traffic therein.

As to taxation, Kentucky places a production tax on the manufacture of all intoxicating liquors in this State, and also places a retail sales tax on the retail sale of all such commodities in this State. Hence, Kentucky is, from a revenue point of view, also interested in protecting against untaxed manufacture and sales. Thus, it will be seen that both distinctions pointed out in *Lemke v. Farmers' Grain Co.*, supra, are present in this controversy.

Finally, we wish to point out that even appellants' counsel do not really consider the *Lemke* case to be controlling in this controversy, for on page 99 of their brief they state:

"Yet, it is ~~not~~ precisely at the moment of delivery of the consignment to the carrier that the commerce acquires its interstate character and the protection of the Commerce Clause."

Obviously, if Kentucky has the right to control the manufacture it has the right also to state who may receive



this whiskey for transportation; and such a provision would affect the product prior to its introduction in interstate commerce. See dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Penn. v. W. Va.*, 262 U. S. 553, 67 L. Ed. 1117.

**E. A State May Control the Use of Its Roads to Simplify Policing and to Reduce Hazards.**

As we have said the Alcoholic Beverage Control Law of 1938 is a comprehensive act designed to control the traffic in and manufacture of alcoholic beverages. The title to the Act provides in part:

"An Act providing for the regulation of the manufacture of and traffic in alcoholic beverages; . . ."

Appellant in this controversy contends that because of Section 51 of the Kentucky Constitution, nothing in the Control Law's provisions warrants interpreting that Act to be a measure designed to regulate the use of the highways. It will be noted that Section 51 of the Kentucky Constitution provides:

"No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

We submit that the law in question relates to but one general subject, *the control of alcoholic beverages from their manufacture or importation to their use or exportation.*



As has been said by the Kentucky Court of Appeals:

"It is never required that the title state the general manner in which the object of an act is to be accomplished."

*Estes v. State Highway Commission*, 235 Ky. 86, 29 S. W. (2d) 583, 586; *Collins v. Henderson*, 74 Ky. (11 Bush) 74; *Commonwealth v. Bailey*, 81 Ky., 395, 4 Ky. L. Rep. 85.

Granted that this law is not designed as a measure to control generally the use of the roads, but it certainly is a measure designed to control the *traffic* in alcoholic beverages over the roads. The title to the act stated this purpose and the word "traffic" includes transportation. (Webster's New International Dictionary.)

Insofar as the appellant is concerned, the statute in question only affects the using of the roads and streets for the transportation of intoxicating liquors. It is to be remembered that the appellant is using the roads and streets of the Commonwealth of Kentucky and its subdivisions for the carrying on of a private business. As has been said, the State has the power to condition the use thereof as a place for the carrying on of a private business (*Hodge Co. v. Cincinnati*, 284 U. S. 335, 76 L. Ed. 323; *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288).

"From the beginning, it has been recognized that a state can if it sees fit, build and maintain its own highways, canals and railroads, and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected.

Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few local regulations of which are so inseparable



from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the State or its municipal subdivisions."

*South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 187, 82 L. Ed. 734, 740.

(And it should be noted that the roads in that case were built with Federal aid in the same manner as were some Kentucky roads. More than this, the appellant in this controversy runs over streets of the city of Louisville which were not built with Federal aid.)

It is a well-known fact that whiskey is a product highly attractive to "hijackers." The value of a truckload of whiskey may easily run over \$10,000 and seizure of trucks and cargoes have been rather frequent during the years following repeal of the Eighteenth Amendment. In some cases running gun battles have been staged on our roads, creating a danger to others who might happen to be in the vicinity.

Another reason for patrolling the highways is the 43 dry counties in Kentucky. Unless the traffic in alcoholic beverages over our highways is carefully supervised, the desires of these local subdivisions will be violated by bootleggers, who under cover of night will haul truckloads of whiskey for disposition in those counties. If the state knows who may legally haul such liquors and over what roads they will operate, the policing job is simplified.

It is a well-known fact that the bootlegger carries on his acts under cover of darkness, furtively speeding over the roads with lights dimmed, driving at a reckless rate. This situation is a danger to the state, making the roads more hazardous.



It is in this manner that intoxicating liquors have increased the job of policing the highways of the State to prevent lawlessness. The cost of adequately policing all highways against such actions would be prohibitive. Cargoes of whiskey create a special hazard on the roads. Surely this is a situation which the States may cope with by requiring that the State know what roads will be used for the transportation of intoxicating liquors, so that said roads may be more carefully patrolled. As a common carrier may only haul between specified points on a prescribed route, the State will know this route and be able to better protect against the mentioned dangers, thus reducing the patrolling problem. As was said by Mr. Justice Stone in *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 83 L. Ed. (Adv. Op.) 736, the states may classify the vehicles according to the traffic and the burden it imposes on the state by that use. This Court has already recognized the fact that when certain traffic creates special hazards and calls for extra policing, this traffic may be separately classified.

“ . . . and for that purpose they may classify the vehicles according to the character of traffic and burden it imposes on the State by that use. . . . ”

*Clark v. Paul Gray, Inc.*, supra.

**F. Cases Relied upon by Appellant Are to be Distinguished from the Case at Bar.**

Relative to the constitutionality of this act under the Commerce Clause, the appellant cites many cases which we believe have no bearing on this case, and so we will confine this discussion to those cases which might conceivably have some bearing on the controversy at bar.



## Appellant cites:

*Bowman v. Chicago & Northwestern R. Co.*, 125 U. S. 465 (Appellant's brief at 36, 55, 114, 116, 123).

*Leisy v. Hardin*, 135 U. S. 100 (App. brief at 34, 114, 116, 123).

*Vance v. W. A. Vandercook Co.*, 170 U. S. 438 (App. brief at 36).

*American Express Co. v. Iowa*, 196 U. S. 133 (App. brief at 36).

*Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70 (App. brief at 36, 123).

*Adams Express Co. v. Kentucky*, 206 U. S. 129 (App. brief at 36).

(1) Every one of these cases involved prohibiting the importation of intoxicating liquor. (2) *The state from which they were exported had not attempted to control how these liquors were carried and hence these liquors were legitimate objects of commerce.* (3) In every one of these cases, a railway was the means of transportation, while in the present case, the ~~whiskey~~ would be transported over the state highways by motor truck. (4) In none of these cases was the problem of patrolling the roads presented.

The case of *Kirmeyer v. Kansas*, 236 U. S. 568 (appellant's brief at 36, 123) was not a case involving transportation by railway, but is subject to all the other distinguishing points above mentioned.

*Heyman v. Hays*, 236 U. S. 178, 59 L. Ed. 527. (App. brief at 37, 44, 63). This case involved an attempt by the State of Tennessee to tax exporters of liquors. There was no question of controlling the exportation to prevent diversions into illegal fields. *This case did not even involve the police power and has no bearing on the present controversy whatsoever.*



Appellant also cites:

*Michigan Public Utility Comm. v. Duke*, 266 U. S. 570, 69 L. Ed. 445 (App. brief at 38, 44, 68, 120, 123).

*Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101 (App. brief at 69, 91, 92, 103).

These cases differ from the case at bar in that they involve statutes attempting to require all contract carriers to secure certificates of convenience and necessity. In the case at bar no such attempt is made. The business of a contract carrier is not affected except as to the transportation of one product. Suppose for example, that Kentucky had passed a law prohibiting all sales of liquors, would not contract carriers be affected in exactly the same way as the present law affects them? Or could it be said that a contract carrier had any reasonable objection to the statute in question in *Clason v. Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Ops.) 599, wherein the transportation of dead animals was prohibited to all save certain transporters licensed by the State Veterinarian?

Appellant further cites:

*Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623 (App. brief at 46, 47, 91, 120, 123).

*Bush & Sons v. Maloy*, 267 U. S. 317, 69 L. Ed. 627 (App. brief at 47, 120, 123).

*Allen v. Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463 (App. brief at 48, 120, 123).

All three of these cases were clearly cases which did not involve the regulation of a dangerous commodity or a regulation of the transportation of such a commodity but were attempts to prohibit competition. As was said by



Mr. Justice Brandeis in *Buck v. Kykendall* in speaking of the statute involved in that case:

"It determines not the manner of use but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose, and in the same manner."

267 U. S. 307, 315, 69 L. Ed. 623, 627.

The many other cases cited by appellant seem beside the point.

## II. THIS ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The appellant, as we have said, is a contract carrier operating from Louisville, Kentucky, to points north of the Ohio River. The act in question does not, as appellant infers, require that appellant transform itself into a common carrier in order to continue business. The business of appellant as a contract carrier in Kentucky is not affected in any way other than that intoxicating liquors may not be transported to or from premises in Kentucky. Outside of this provision the appellant may come into or go out of Kentucky as unhampered as before.

The appellant adopts "sheep's clothing" when it attempts to play the role of a carrier prohibited from all transportation because it does not hold a common carrier's certificate. Such is not the case. There is no question but that a state may pass a prohibition law which will render valueless breweries, distilleries, and other property used in that business and that such a law will not be considered as taking property without due process of law. *Mugler v. Kansas*, 123 U. S. 623, 664, 31 L. Ed. 205, 211.

"This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the states



intended, by adopting that Amendment to impose restraints upon the exercise of their powers for the protection of the safety, health or morals of the community.

"The principle, that no person shall be deprived of life, liberty or property, without due process of law, was embodied in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the Fourteenth Amendment, and it has never been regarded as incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Nor can it be doubted that Kentucky might have passed a law which in effect would have prohibited all exports of intoxicating liquors, and that such a law would not have been held violative of the due process clause of the Fourteenth Amendment. *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346. So if Kentucky might prohibit all exportation, which would have affected appellant quite as much as the present act, why cannot this State limit the exportation to a class?

Appellant relies on three cases which we will show have no application to the case at bar:

*Michigan Public Utility Comm. v. Duke*, 266 U. S. 579, 69 L. Ed. 445 (App. brief at 68).

This case involved an attempt by the State of Michigan to make all contract carriers become common carriers. No such attempt is made under this Kentucky law. All contract carriers may continue to operate unhampered save that they may not haul intoxicating liquors unless they comply with the provisions prescribed in this act.

*Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101 (App. brief at 69).



Again, we have a case wherein a state attempted to make all carriers become common carriers. The avowed purpose of the act was to control competitive conditions. Neither of these factors appear in this present controversy.

*Smith v. Cahoon*, 283 U. S. 553, 75 L. Ed. 1264 (App. brief at 72).

This case may be distinguished on exactly the same grounds as the *Duke* and *Frost* cases. This was another attempt of a state to require all carriers to become common carriers.

### III. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant complains that it is denied equal protection because a truck common carrier is allowed to secure a liquor transporter's license while a truck contract carrier is not accorded that privilege and hence may not transport distilled spirits and wine to or from premises in Kentucky for hire.

We have already stated with great particularity in our introductory Statement the reasons for this classification and so we feel that it is not necessary to repeat what has been said. To counsel for appellees it seems that the difference between operating on schedule on a fixed route, between definite termini and operating at any time on any road between any termini is the ground for classifying these carriers. It is manifestly easier to patrol intoxicating liquors being taken over known routes by a limited number of carriers. See *Clark v. State*, — Tenn. —, 113 S. W. (2d) 374.

We have already pointed out that the Commonwealth of Kentucky could by complete prohibition, prevent the



transportation of any such liquors to or from Kentucky premises. Surely a lesser degree of regulation than total prohibition is permissible.

The classification is based upon distinctions which the General Assembly of Kentucky thought bore a relation to the problem of controlling this traffic. As this court has said:

"The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.

"Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong."

*Stephenson v. Binford*, 287 U. S. 251, 272, 77 L. Ed. 288, 298.

Appellees might point out that this control law provides for "Field Representatives" who "shall have full police powers such as are now vested in sheriffs and other peace officers." (Section 9, Chapter 2, Acts of 1938, Section 2554b-105, Baldwin's 1938 Kentucky Statute Supplement.) There are now over fifty of these officers serving the Commonwealth whose duty it is to make effective the provisions of this Act.

"That the Fourteenth Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled and requires no reference to authorities. And it is equally settled—as



we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.”

*Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 52, 54 L. Ed. 921, 928.

This Court has held that where a particular article or traffic creates a special hazard, then special laws designed to police the article or traffic may be adopted by a state. *South Carolina Highway Department v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734; *Morf v. Bingham*, 298 U. S. 407, 80 L. Ed. 1245. And as we have already shown that the traffic in intoxicating liquors does produce special hazards, there seems to be no question but that steps taken by Kentucky to alleviate the dangers are valid if they bear some “reasonably conceivable” relation to this desired end.

#### IV. THE CONSTITUTIONALITY OF THE PENALTIES PROVIDED IN THE CONTROL LAW.

Appellant makes the further contention that this Alcoholic Beverage Control Law is invalid under both the due process and the equal protection clauses of the Fourteenth Amendment because the penalties prescribed are so severe as to preclude resort to the courts in the ordinary course to secure a judicial review of the validity of the Control Law.



Appellees would like to point out that this case arises out of an action in equity seeking to enjoin the officers of the Commonwealth of Kentucky from enforcing and from attempting to enforce provision of this alcoholic beverage control law relating to transportation. *There has been no attempt to enforce, as against appellant the penalties provided in this act* and the penalty provisions are separable from the sections regulating the traffic and transportation in alcoholic beverages. Section 120, Chapter 2, Acts of 1938 (Section 2554b-221, Baldwin's 1938 Kentucky Statute Supplement) reads as follows:

"The titles, articles, sections, sub-sections and all provisions of this Act are severable, and if any of its titles, articles, sections, sub-sections, provisions or the application thereof shall be held unconstitutional, such title, article, section, sub-section, provision or application thereof held to be invalid may be rejected without affecting the remainder of the Act, and the decisions of the courts shall not affect or impair the remaining titles, articles, sections, sub-sections, provisions of this Act or the application thereof. It is hereby declared to be the Legislative intent that this Act would have been adopted had not such unconstitutional title, article, section, sub-section or provision been included therein. It is hereby further declared to be the Legislature's intention in enacting this Act that each title, article, section, sub-section and provision would have been enacted separately, except that if any provision of section 16 of this Act is held to be invalid that entire section shall be construed to be invalid."

This Court has already said:

"It is contended by appellants that the statute is void upon its face because the severity of the penalties preclude an appeal to the courts against its provisions except at such risks and costs that they should not be compelled to incur, and *Ex Parte Young*, 209 U. S. 123, is adduced. But the provision for penalties is in a section by itself and when their enforcement is



attempted their constitutionality can then be determined. *Minnesota Rate Cases*, 230 U. S. 352; *Louisville & Nashville R. R. Co. v. Garrett*, ante, page 298."

*Grand Trunk Ry. Co. v. Michigan Railroad Commission*, 231 U. S. 457, 473, 58 L. Ed. 310, 319; see also: *Phoenix Railway Co. v. Geary, et al.*, 239 U. S. 277, 60 L. Ed. 287.

So appellees, in this present controversy, contend that *when the enforcement of the penalties provided in the Alcoholic Beverage Control Law is attempted, then the constitutionality thereof can be determined*, but until that time it is not necessary to make such a determination. Even if the penalty provisions were invalid, this would not affect the validity of the separate provisions relating to transportation.

In support of this argument, appellant cites:

*Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92 (App. brief at 81).

*Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714 (App. brief at 82).

*Southwestern Tel. & Tel. Co. v. Danaher*, 238 U. S. 482, 59 L. Ed. 1419 (App. brief at 84).

*Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. Ed. 596 (App. brief at 84).

*Oklahoma Gin Co. v. Oklahoma*, 252 U. S. 339, 64 L. Ed. 600 (App. brief at 85).

*Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300, 82 L. Ed. 276 (App. brief at 85).

These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to *legislative acts*. These cases are all based upon the principle that penalties cannot be collected if they deter an interested party from testing the validity



of legislative rates or orders legislative in their nature.

See: *Wadley Southern Railway Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. 405.

As was said in *Ex Parte Young*, 209 U. S. 123, 147, 52 L. Ed. 714, 724:

"Ordinarily, a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question, whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact, which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

The statutes now in question make it a crime punishable by fine of not less than \$100.00 and not to exceed \$5000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment, to transport over Ken-



tucky roads over three gallons of distilled spirits and wine to or from Kentucky premises without a license. This is a quite different statute from one giving a commission the power to make *rates or orders* and providing a penalty for the enforcement thereof.

In every case cited by appellant, a *rate or commission's order was to be enforced by a severe penalty, and the order could only be tested by disobeying it.* Seemingly this doctrine is or should be confined solely to those fields and should not be carried over into the field of ordinary criminal penalties for the breach of a criminal statute. To hold otherwise would, by analogy, invalidate every criminal statute passed by the General Assemblies of the Commonwealth of Kentucky, for in no statute has a special provision been made to allow a "contemplating law violator" the right to test the validity of the criminal statute prior to his breach of said law.

If, however, appellees should be in error as to the scope of this doctrine and if this Court be of the opinion that the penalty in question be such a deterrant to the questioning of the validity of the statute as to be unconstitutional, still appellees insist that as the operation of the penalty provisions could have been suspended by injunction, an opportunity thus was afforded for safely testing the validity of the statute. See *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U. S. 63, 64 L. Ed. 139; *Phoenix Railway Company v. Geary*, 239 U. S. 277, 60 L. Ed. 287; *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. Ed. 596.

Other provisions of this same act have been questioned before in the Kentucky Court of Appeals and during the pendency of these actions the plaintiffs have operated under injunctions and restraining orders issued by Kentucky Courts. *Beacon Liquors v. J. W. Martin, et al.*,



— Ky. —, — S. W. (2d) —; *Keller v. Kentucky Alcoholic Beverage Control Board*, 279 Ky. (Adv. Sheets) 272, 130 S. W. (2d) (Adv. Sheets) 821. Thus the Kentucky courts do grant injunctions pending a suit *questioning the constitutionality* of this Alcoholic Beverage Control Law.

The appellant's counsel have misinterpreted the law when they intimate that the privilege of seeking by injunction to test the constitutionality of an act, has been taken away. This is not the case as evidenced by the two Kentucky cases mentioned. Injunctions are prohibited only on an appeal from the Board's action involving exercise of discretion in connection with which there would be no question of the constitutionality of the statute. When the constitutionality of a statute is involved, the legislature has no authority to limit the attack thereon, nor has this been attempted. The only limit is that upon the *appeal* from the Board's action to the courts. ○

“Here it does not appear that the carrier had not been afforded an adequate opportunity for safely testing the validity of the rate or that its deviation therefrom proceeded from any belief that the rate was invalid. On the contrary, it is practically conceded—and we judicially know—that if the carrier really regarded the rate as confiscatory, the way was open to secure a determination of that question by a suit in equity, against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction.” (Emphasis Ours.) *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U. S. 63, 65, 64 L. Ed. 139, 140.

In the present case this court must judicially know that this appellant secured a temporary restraining order pending the decision of the specially constituted Three-Judge District Court and is now operating under a temporary



*injunction pending the decision of this Supreme Court.* It seems perfectly apparent that the appellant has had an adequate opportunity safely to test the validity of this statute. Again it would seem that, as to appellant, the constitutionality of these penalties is moot.

Finally we think it proper to quote a portion of Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction*, 43 Harv. Law Rev. 426, 436, in speaking of regulatory statutes:

"The essential differences between this type of legislation and the tax statutes which have just been considered are two. This legislation imposes a duty of continued action or inaction vastly increasing the burden of protracted litigation; it also affects far more closely a class of persons who may and are intended to benefit from its provisions. Like the tax statutes, there is almost invariably to be found some inducement to obedience in the form of a penalty or provision for summary forfeiture..

"Those embraced within the terms of a statute of this type find themselves subjected to a burdensome limitation on their freedom of conduct, existing and effective independently of any action at law to enforce it, as to the validity of which no test may be had at law in the absence of a breach of its provisions. The very assumption is of voluntary obedience, and a court of law does not give redress for injuries voluntarily incurred. There remains but two ways of testing the statute at law: a single breach followed by obedience, or complete disobedience, until the final determination of its validity.

"The first possibility forces the contestant to risk the loss of the penalty, if he loses the suit, and the loss flowing from obedience even if he wins. In the one case, he pays a high price, to which the state has no particularly meritorious claim; in the other, he suffers a loss which the decision of the court will have estab-



lished to be unjust. The second possibility of continued disobedience involves a vast accumulation of penalties, mounting constantly as the litigation proceeds. Either makes a case even stronger than the tax cases for the intervention of equity, which can enjoin the collection of the penalties regardless of its decision on the merits.

"But conversely, the evil consequences of postponing performance of the statutory obligation will be measurably greater, entailing suspension of measures deemed essential by the state for the public good. As in rate cases, no form of compensation known to the law can make whole this injury to the state, if the injunction proves to have been improvidently granted. And in most instances, those in whose behalf the legislation was adopted can likewise receive no return for the benefits which they have lost. An injunction may make possible the continued subjection of the buying public to a forbidden form of food, with no recourse to any who have purchased and eaten it except for injury proximately resulting; or it may foist upon the community for a long period undesirable occupations or undesirable practitioners of desirable ones. Evils of this sort no bond or other security can remedy. But it seems impossible to say more than that the burden of loss incident to the time necessary for the law to take its course must fall one way or the other: there is no way to prevent its falling. The possibility of a serious loss to the owner of a business or a practitioner of a profession must be weighed against the possibility of injury to the public, and the declaration of policy by the state must be given the weight it deserves. Rules cannot be formulated which will serve to solve the difficulties. The lack of a more perfect solution may not be made a criticism of equity, since no better one may be offered. Rather again, it is a case for the exercise of the sound discretion of the chancellor."

(Footnotes omitted.)



## CONCLUSION

It has been the endeavor of appellees to call to this Court's attention decisions holding statutes valid which more vitally affected interstate commerce than does the statute in question, such as the licensing of all railroad engineers (*N., C. & St. L. Ry. Co. v. Ala.*, supra); prohibition of the running of freight trains on Sunday (*Hennington v. Georgia*, supra); requiring "full crews" on trains (*C., R. I. & P. Ry. Co. v. Ark.*, supra); regulation of motor caravans (*Morf v. Bingaman*, supra); regulating the weight of trucks running over the highway (*South Carolina Highway Dept. v. Barnwell Bros.*, supra); prohibition of healthy people entering certain areas (*Compagnie Francaise v. Board of Health*, supra); prohibition of the transportation of certain quantities of gasoline over the streets (*Ash v. Gibson*, supra); regulation of tug boats engaged in interstate commerce (*Kelly v. Washington*, supra); regulation of the importation of coal by truck (*Yager v. State*, supra); limitation of the transportation of dead animals to those licensed to carry them and prohibiting all exportation (*Clason v. Indiana*, supra); the prohibition of the shipment of certain citrus fruits out of a state (*Sligh v. Kirkwood*, supra).

We have pointed out decisions limiting the exportation of intoxicating liquors to common carriers or the manufacturer thereof (*Clark v. State*, supra); and requiring a license of all who transported such liquors by truck (*Commonwealth v. One Dodge Motor Truck*, supra).

We have shown that Congress has not occupied the field, that the Motor Carrier Act of 1935 does not attempt to cover the patrolling of the roads; the correction of certain hazards created by the trucking of certain commodities (*Morf v. Bingaman*, supra; *Clason v. Indiana*, supra);



nor the regulation of the roads over which carriers may haul (*Bradley v. Public Utilities Comm. of Ohio*, supra). The Knox Act was shown only to affect the labeling of packages of liquor. The Federal Alcoholic Administration Act was shown to have no effect and that the only pertinent provisions related to bottling, packaging, and labeling. The Liquor Enforcement Act of 1936 was shown only to apply to the importation of these liquors into dry states.

We have pointed out the decisions of this Court holding that a state may in effect prohibit the exportation of certain commodities, including whiskey, while allowing intrastate commerce (*Kidd v. Pearson*, supra; *Geer v. Connecticut*, supra; *Hudson County Water Co. v. McCarter*, supra; *Sligh v. Kirkwood*, supra; and *Clason v. Indiana*, supra), and cited opinions holding that the power to prohibit includes the lesser power to regulate. *Seaboard Air Line v. North Carolina*, supra; *Davis v. Mass.*, supra; *Rippey v. Texas*, supra; *State Board v. Young's Market*, supra; and *Eberle v. Michigan*, supra; *Commonwealth v. One Dodge Motor Truck*, supra; *Jefferson County Distillery Co. v. Clifton*, supra; and *Clark v. State*, supra. We have shown that the state may control the use of its roads to simplify the policing and to reduce hazards. (*South Carolina State Highway Dept. v. Barnwell Bros.*, supra; *Morf v. Bingaman*, supra) and have pointed out that the trucking of whiskies creates a special hazard on our roads due to "bootlegging" and "hijacking."

It has been pointed out that this act affects these liquors before physical movement begins in commerce of any kind.

Further it has been shown that there is no property taken without due process (*Mugler v. Kansas*, supra; *Kidd v. Pearson*, supra), and that there is no violation of the equal protection clause. *Stephenson v. Binford*, supra;



*Louisville & Nashville R. R. Co. v. Melton*, supra; *Clark v. State*, supra.

We have addressed ourselves to the constitutionality of the penalty provisions, showing that these penalty provisions are separate and that until the attempted enforcement of these provisions, their constitutionality is moot, as to this case (*Grand Trunk Ry. Co. v. Michigan Railroad Commission*, supra). We have also attempted to show that the constitutionality of these penalty provisions is obvious (*Ex Parte Young*, supra), because they are ordinary criminal penalties for violation of the law. Finally it was shown that the penalty could have been enjoined (*St. Louis I. Mt. & So. Ry. Co. v. Williams*, supra; *Phoenix Ry. Co. v. Geary*, supra; *Oklahoma Operating Co. v. Love*, supra), and so there is no basis for determining the penalty to be a deterrent to anyone testing the validity of the transportation provisions of this "Control Law."

Despite the attempts of appellant to infer otherwise, the statute in question in no way affects the status of contract carriers, save as to transportation of intoxicating liquors. Contract carriers may come into and go from Kentucky just as freely as they did before the passage of this act. There is no deep purpose to convert all carriers into common carriers as was apparent in *Smith v. Cahoon*, supra; *Michigan Public Util. Comm. v. Duke*, supra; *Frost Trucking Co. v. Railroad Commission*, supra. All that is apparent is an honest attempt to control the traffic in a commodity dangerous to health and morals. Nor can it be said that there is a deliberate attempt to control interstate commerce. Instead, the manifest purpose of this statute is to channelize the transportation of these products.

Of what use would be the control of the manufacturing or sales in those commodities, if no control could be exer-



cised over the distribution? It is no answer to say the absence of federal legislation infers an unhampered right to transport, free of all state restrictions. What could be worse than a situation where the state was powerless to protect itself against the evils of certain commodities concerning which Congress has not legislated and which were supposedly destined for another state. The Commerce Clause was never intended to render a state helpless against known evils masquerading under its banner. Instead, it has been clearly manifested by this court that a state may protect itself from commodities demanding regulation. *Clason v. Indiana*, supra; *Sligh v. Kirkwood*, supra.

In order to protect its people a state must have the power to guard against evils which are peculiarly local and hence not covered by federal legislation. The problem of preventing the diversion of whiskey which has been manufactured in the state is one which is peculiarly Kentucky's. As we have pointed out, Kentucky has millions of gallons of these liquors stored within her bounds, and thus her problem differs from that of other states whose problem it is to prevent illegal importation.

"Indeed, it is a principle fully recognized by decisions of state and federal courts that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."

*Nashville, Chattanooga & St. L. Ry. Co. v. Ala.*, 128  
U. S. 96, 100, 32 L. Ed. 352, 354.



Again this Court has said:

"Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce."

*Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. Ed. 166, 174.

We submit that it is the duty of this state to protect its citizens from the chaotic flood the 192,352,572 gallons of whiskey stored in Kentucky would cause if not channelized and controlled, and that:

"The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for the cases within the scope of its power, the rule of the state law, which until displaced, covers the subject."

*Smith v. Alabama*, 124 U. S. 465, 477, 31 L. Ed. 508, 512.

Respectfully submitted,

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HARRY D. FRANCE, *Asst. Atty. General*

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By: H. APPLETON FEDERA, *Of Counsel*







OCT 9 1939

CHARLES CLARKE COOPER  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 8

ZIFFRIN, INCORPORATED - - - - Appellant,

vs.

JAMES W. MARTIN, Commissioner of  
Revenue of the Commonwealth of  
Kentucky, et al. - - - - Appellees.

## SUPPLEMENTAL BRIEF FOR APPELLEES

HUBERT MEREDITH,  
Attorney General of the Commonwealth  
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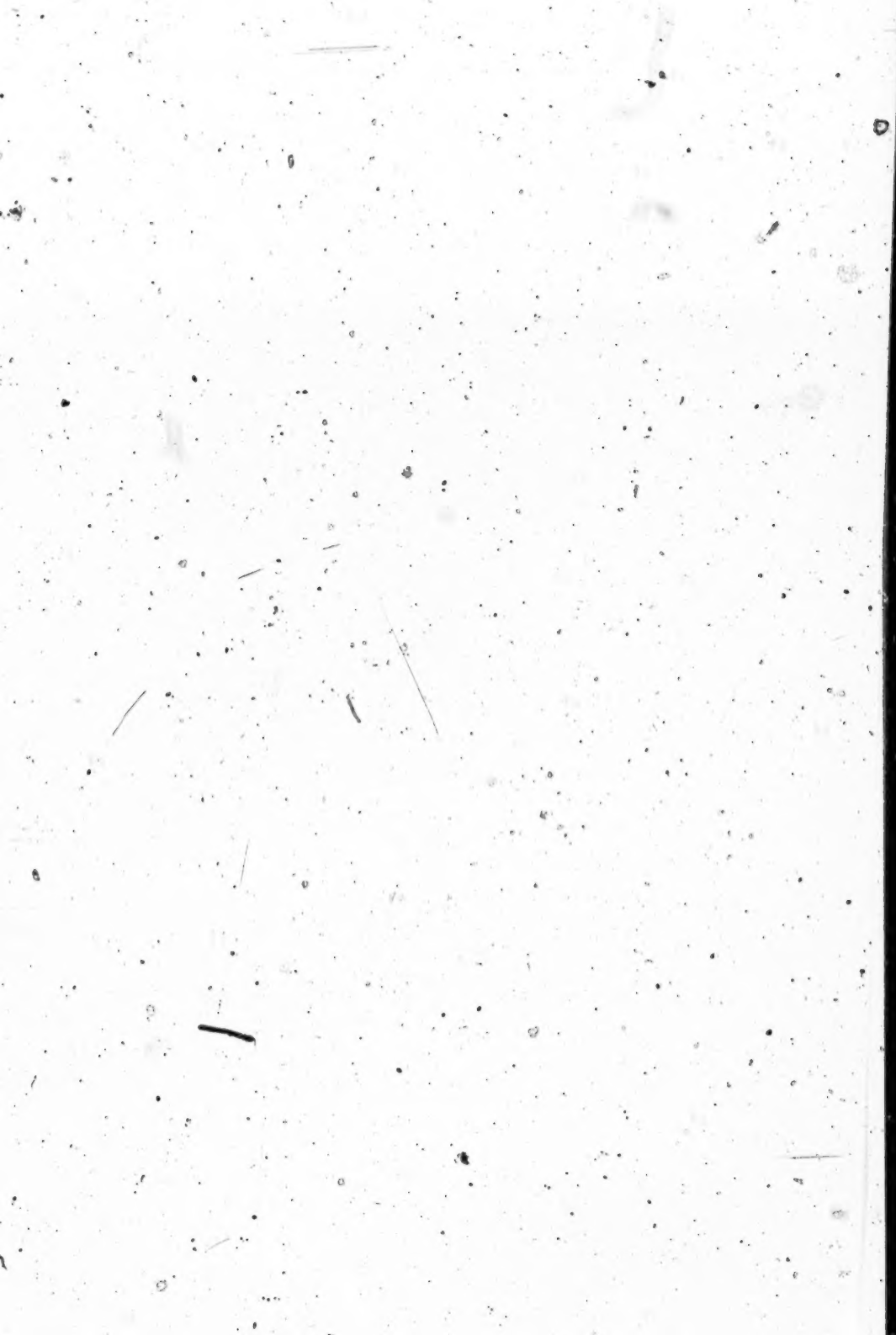
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✓ WILLIAM HAYES,  
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Counsel for Appellees.







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# Supreme Court of the United States

OCTOBER TERM, 1939

No. 8

ZIFFRIN, Incorporated - - - - - *Appellant,*

vs.

JAMES W. MARTIN, Commissioner of Revenue  
of the Commonwealth of Kentucky, et al. - *Appellees.*

## SUPPLEMENTAL BRIEF FOR APPELLEES

Believing that the reply brief of appellant raises certain questions which should be answered, and further believing that certain sections of the Control Law have not as yet been called to the attention of this Court, appellees ask leave to file this supplemental brief.

### I.

**REPLY TO APPELLANT'S CONTENTION THAT NEITHER THE CONTROL LAW NOR THE FACTS SUPPORT THE CONTENTION THAT THE WHISKEY INVOLVED WAS MANUFACTURED UPON CONDITION THAT IT WOULD BE CARRIED ONLY BY THE DISTILLER OR BY COMMON CARRIERS.**

On page 12 of appellant's reply brief we find the contention made that liquor manufactured prior to July 1, 1938,



could not be subject to a provision that no liquor other than that trafficked in in accordance with the 1938 Alcoholic Beverage Control Law might be legally transported.

It seems to appellees that an almost identical contention was made in the case of *Samuels v. McCurdy*, 267 U. S. 188, 69 L. Ed. 568. In that case this Court had before it a Georgia statute making it unlawful for a person to possess intoxicating liquors. The liquors in question had been lawfully acquired previous to its enactment and were for consumption as a beverage in the home of the purchaser.

In speaking of *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, this Court in the *Samuels* case said:

"In view of this language and the agreed statement of facts, the decision necessarily was that the sale of beer made and owned before the prohibition law could be punished by that law as a nuisance and that no compensation was necessary, if the legislature deemed this to be necessary for the health and morals of the community."

Further the opinion writer, Mr. Chief Justice Taft, said:

"The Legislature had this power whether it affects liquor lawfully acquired before the prohibition or not."

Section 53, Chapter 2, Acts of 1938 (Section 2554b-151, Baldwin's 1938 Kentucky Statute Supplement) provides in part:

"The following property is hereby declared to be contraband . . . (2) Any spirituous, vinous, or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act."



Clearly this section does not distinguish between liquors manufactured or acquired previous to the effective date of this Act and those manufactured or acquired after the effective date of the Act. Thus any liquor, no matter when made or acquired, is subject to the provisions of this section if in the possession of an unauthorized shipper. ◊

It is our opinion that the *Samuels* case and the section quoted above of the Alcoholic Control Law show first, that liquor acquired or manufactured previous to the passage of the Act may be subject to any conditions which the Legislature subsequently sees fit to place upon the use or traffic therein. Secondly, this section quoted above indicates that the General Assembly declared all liquors, no matter when manufactured or acquired, in the possession of an unauthorized shipper to be contraband; and although the Kentucky General Assembly did not specifically say that property rights in such liquors were taken away, the General Assembly by the provisions of this section certainly did in fact take away property rights. It will be noted that in this section under certain conditions liquors not in the possession of anyone entitled thereto may be taken without search warrant, and further, the title thereto may be vested in the Alcoholic Beverage Control Board without action by a court.

We submit that the effect of this section is exactly the same as one section of the Georgia law in question in the *Samuels* case. We further submit that the General Assembly need not have expressly said, "We are taking away property rights in liquor," when the provisions of that section in fact did such.

On page 15 of appellant's reply brief we find the statement that the concluding paragraph of the contraband section not less than ten times speaks of whiskey carried by an unlicensed carrier as property. We ask the Court to



examine this section. We believe that the Court will find that the Kentucky General Assembly was merely using the word "property" as a general term to designate several specific items such as firearms, stills, materials, equipment, and spirituous, vinous, or malt liquors. The General Assembly had no intention of binding themselves by the use of this general term to prevent the reduction of property rights in liquors.

On page 14 of appellant's reply brief we find this statement:

"Previously we have assumed that the Control Law appends to the grant of the privilege of manufacturing the condition of transportation by common carrier. The truth is that in according the privilege and distiller's license to the manufacturer, the Control Law does no such thing."

This statement entirely overlooks Section 36, Chapter 2, Acts of 1938 (Section 2554b-134, Baldwin's 1938 Kentucky Statute Supplement) which provides:

"In addition to such other information as the Alcoholic Beverage Board may by its rules and regulations require, every application for a license under this Act shall contain the following information, given under oath:"

"(5) A statement that the applicant will in all respects and in good faith conscientiously abide by all the provisions of this Act and of any other Act or ordinance relating to alcoholic beverages which may be in force in the location at which the applicant seeks to do business, as well as all rules and regulations of the State Alcoholic Beverage Board . . ."

"(7) Any false material statement contained in an application shall be ground for refusal to issue a license, or if the falsity of the statement be not dis-



covered until after a license has been issued, revocation of such license shall be mandatory."

Surely this section conditions the holding of a license to the applicant conscientiously abiding by all the provisions of the Act, one of which is that only licensees, railroads, and railway express companies may haul intoxicating liquors. Thus it must be that the distiller's license is conditioned upon obeying this provision.

We ask the Court to note that this section requires the statement that the applicant will conscientiously abide by the Act. *Could it be considered abiding by the Act if a licensee thereunder were allowed to help unlicensed persons to do acts which this law requires licenses for the doing thereof?* Surely this was not the intention of the General Assembly of Kentucky, and we cannot believe that this Court will construe this Act so that one licensee thereunder may act in a manner which would render the enforcement of the remainder of the Act more difficult. Further, we wish to call to the Court's attention the fact that all licenses issued under this Act expressly carried a provision that the licensee is subject to the laws, rules, and regulations of the Commonwealth of Kentucky.

But assuming that there was no condition on the manufacturer to keep this liquor in legal channels, still appellees contend that the case of *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835 would be authority that the Act in question was constitutional. In that case as we have already shown in our principal brief the Court did not prohibit the picking of unripe citrus fruits for purposes of exportation, which, we believe, would be similar to the condition of the manufacture of intoxicating liquors for exportation. What was prohibited in that case was the *shipping or delivering for shipment out of the state* of part of the citrus fruits. This, we



believe, is the nearly exact situation in the controversy at bar.

Thus even if liquors were not conditionally manufactured under this Act, still it would seem that they cannot be shipped out of the state or delivered for shipment if the state sees fit to prohibit their shipment. In *Samuels v. McCurdy*, supra, as we have already stated above, liquors acquired previous to the effective date of an act prohibiting their use for all but certain purposes were just as much affected as liquors acquired after the effective date of the act. These cases, it would seem to the appellees, overrule the dictum in *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, (Appellant's reply brief, page 4) to the effect that:

"The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded."

Certainly *Sligh v. Kirkwood* and *Samuels v. McCurdy*, supra, have reached a different conclusion from this.

## II.

### **REPLY TO THE CONTENTION OF APPELLANT THAT THE REQUIREMENT OF A COMMON CARRIER'S CERTIFICATE IS NOT A REASONABLE REGULATION.**

On page 19 of appellant's reply brief we find this statement:

"The brief for appellees shows that Kentucky, in efforts to prevent diversion, relies upon written reports (pp. 9, 10) rather than upon actual policing of the highways (p. 5)."



Had counsel for appellant read our principal brief as far as page 50 he would have found the statement:

"Appellees might point out that this control law provides for 'Field Representatives' who 'shall have full police powers such as are now vested in sheriffs and other peace officers.' (Section 9, Chapter 2, Acts of 1938, Section 2554b-105, Baldwin's 1938 Kentucky Statute Supplement.)"

On pages 19 and 20 of appellant's reply brief we find a statement which might easily be misconstrued:

"Motor Carrier Act, 1935, U. S. C., Title 49, Section 303, sub-sec. a, sub-parags. 14, 15 (App. to our principal brief, p. 25), defines the two classes and distinguishes between them on the basis whether the carrier does, or does not, undertake to carry 'for the general public.' No mention whatever is made of termini or schedules with respect to either class, and sub-paragraph 14 expressly contemplates transportation by common carriers 'over regular or irregular routes.'"

*This statement loses sight of the express provisions of the Kentucky law which contemplates fixed routes between definite termini.* (See Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-55 and 2739j-49, 50, 51, 52, all being sections of Chapter 104, Acts of 1932.)

On page 20 of appellant's reply brief we find this statement:

"The complaint shows Ziffrin's operations in Kentucky to be conducted within the corporate limits of the city of Louisville, a city of the first class, and within a radius of ten miles of its limits. Under Kentucky Statutes, Section 2739j-94 (Appendix to our principal brief, p. 20), even a common carrier so operating would



be exempt from the provisions of the Kentucky Motor Vehicle Transportation Act, would not be required to obtain a Common Carrier's Certificate, and would be under no obligation to run between definite termini, on prescribed routes or on definite schedules."

We believe that appellant's counsel has misread the section to which he refers. This section provides:

"There shall be exempted from the provisions of this Act: . . . ;

"Two. Motor vehicles for hire operating exclusively within the limits of a city or incorporated town or within ten miles of its limits. . . ." (Chapter 64, Acts of 1936, Section 2739j-94, Carroll's Kentucky Statutes; 1936 Edition.)

This provision does not say "operating in Kentucky within ten miles of the limits of a city." It says "*exclusively* operating within the limits of a city or within ten miles of its limits." The obvious purpose of this provision was to exempt city delivery services who might make short runs out of the city to suburban areas.

If we go to the complaint we find that appellant alleges it makes trips to Chicago which is more than ten miles from the city limits of Louisville.

Clearly then appellant does not come within the exemption and so insofar as this controversy is concerned, this point should remain moot.

Thus contrary to the contention of counsel for appellant, the Kentucky General Assembly did not exempt common and contract carriers from securing a Kentucky certificate except in one situation, that situation being city delivery service; and as we have pointed out, the appellant



in this situation cannot lay claim to being within this exemption.

### III.

#### REPLY TO APPELLANT'S ARGUMENT ON THE SEPARABILITY OF THE PENALTIES.

On page 26 we find this highly unusual statement:

"Were this Court to rule as urged by appellees' counsel, then as surely as in the disparaged rate cases, Ziffirin could test the penalties' validity only by violation."

This statement entirely overlooks the fact that if the provisions regarding transporters are valid, then there is no reason for testing the validity of a completely separate section providing a penalty of which there has been no attempted enforcement. Even if the penalty provisions were invalid, still it cannot be held the appellant in this controversy may carry intoxicating liquors unless he complies with the provisions of an entirely separate section regarding transportation of such liquors.

### CONCLUSION

In conclusion we wish to call to the attention of this Court the fact that the Commonwealth of Kentucky is not attempting to harm business of contract carriers but is only seeking to protect its people from the known evils intoxicating liquors may produce if uncontrolled. One interest must be balanced against the other.

To the contrary appellant is seeking to tear down this protective regulation rather than comply therewith because it feels that it would be more expensive to it to comply.



We hope that this Court will not feel the morals of Kentucky less important than a handful of silver.

Respectfully submitted,

HUBERT MEREDITH, *Attorney General*

M. B. HOLIFIELD, *Asst. Atty. General*

HARRY D. FRANCE, *Asst. Atty. General*

WILLIAM HAYES, *Asst. Atty. General*

By: H. APPLETON FEDERAL *Of Counsel*



P 4

# SUPREME COURT OF THE UNITED STATES.

No. 8.—OCTOBER TERM, 1939.

Ziffrin, Incorporated, Appellant, Hyde Reeves, vs. <del>James W. Martin</del> , Commissioner of Revenue of The Commonwealth of Kentucky, et al.	}	Appeal from the District Court of the United States for the Eastern District of Kentucky.
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[November 13, 1939.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Since March 1933 appellant, an Indiana corporation, has continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. It has permission under the Federal Motor Carrier Act, 1935,<sup>1</sup> to operate as a contract carrier, and claims the right to transport whiskey as heretofore, notwithstanding inhibitions of the Kentucky Alcoholic Beverage Control Law approved March 7, 1938.<sup>2</sup> By this proceeding it seeks to restrain officers of the State from enforcing the contraband and penal provisions of that enactment.

The bill charges that to enforce the Control Law would impair appellant's rights under the Commerce Clause, Federal Constitution, and deprive it of the Due Process and Equal Protection guaranteed by the Fourteenth Amendment. The District Court—three judges sitting—sustained a motion to dismiss. A direct appeal brings the matter here.

The Statute is a long, comprehensive measure (123 sections) designed rigidly to regulate the production and distribution of alcoholic beverages through means of licenses, and otherwise. The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue. To this end manufacture, sale, transportation, and possession are permitted only under carefully prescribed conditions and subject to

<sup>1</sup> Aug. 9, 1935, c. 498, 49 Stat. 543; U. S. C. A. Title 49, sec. 301, et seq.

<sup>2</sup> Kentucky Acts 1938, Ch. 2; Baldwin's Supp. to Carroll's Statutes 1936, Ch. 81, sec. 2554b-1, et seq.



constant control by the state. Every phase of the traffic is declared illegal unless definitely allowed. The property becomes contraband upon failure to observe the statutory requirement and whenever found in unauthorized possession.

Section 52 provides—"It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act."<sup>3</sup>

Section 53 declares to be contraband: "(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act."<sup>4</sup> Peace officers are authorized to seize such contraband and institute proceedings for forfeiture.

Licenses are authorized (sec. 18(1)-(9))<sup>5</sup> for distillers, rectifiers, vintners, wholesalers, retailers, and (sec 18(7))<sup>6</sup> for the transportation of liquors to and from any point in the state. Privileges which may be exercised under these are definitely set out.

<sup>3</sup> Baldwin's Supplement to Carroll's Kentucky Statutes 1936, sec. 2554b-150.

<sup>4</sup> *Supra* Note (3), sec. 2554b-151. "The following property is hereby declared to be contraband: (1) Any illicit still designed for the unlawful manufacture of intoxicating liquors, or any apparatus designed for the unlawful manufacture of spirituous, vinous, malt or intoxicating liquors. An illicit still or apparatus designed for the unlawful manufacture of intoxicating liquors shall include (a) An outfit or parts of an outfit commonly used, or intended to be used, in the distillation or manufacture of spirituous, vinous or malt liquors which is not duly registered in the office of a collector of Internal Revenue for the United States, and the burden of proving that same is so registered shall be on the defendant or defendants under charge; (b) any and all material, equipment, implements, devices, firearms, and other property used or intended for use, directly and immediately, in connection with the illicit traffic in alcoholic beverages. (2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act. (3) Any spirituous, vinous or malt liquors in the possession of any one and to which the revenue stamps have not been affixed as and when required by the provisions of the Alcoholic Beverage Tax Act, sections 4281c-1 to and including 4281c-25, Carroll's Kentucky Statutes, one thousand nine hundred thirty-six (1936) edition. (4) Any distilled spirits, wine or malt beverage in a container of a size prohibited by law or prohibited the particular party in whose possession same is found. (5) Any distilled spirits or wine kept in an unauthorized place within any licensed premises under the provisions of section 77 of this Act. (6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages."

<sup>5</sup> *Supra* Note (3), sec. 2554b-114.

<sup>6</sup> *Supra* Note (5).



Section 21—"A distiller's, rectifier's or Vintner's license, as the case may be, shall authorize the holder thereof, at the premises specifically designated in the license, to engage in the business of distiller, rectifier, or vintner, as the case may be, as those terms are defined in this Act, and to transport for himself only any alcoholic beverage which he is authorized under this license to manufacture or sell."

Section 22—"Sales and deliveries of alcoholic beverages may be made at wholesale, and from the licensed premises only,

(3) by licensed distillers, rectifiers or vintners for export out of the Commonwealth; provided, no distiller, rectifier or vintner, shall sell or contract to sell, give away or deliver any alcoholic beverages to any person, who is not duly authorized by the law of the State of his residence and of the Federal Government if located in the United States, to receive and possess said alcoholic beverages; and in no event shall he sell or contract to sell, give away or deliver, any of his products to any retailer or consumer in Kentucky."

Section 27—"A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided" etc.<sup>7</sup> Section 54(7)—"A Transporter's License as provided for in section 18(7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."<sup>8</sup>

Section 89—"No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."<sup>9</sup>

<sup>7</sup> *Supra* Note (3), sec. 2554b-118.

<sup>8</sup> *Supra* Note (3), sec. 2554b-119.

<sup>9</sup> *Supra* Note (3), sec. 2554b-124.

<sup>10</sup> *Supra* Note (3), sec. 2554b-154(7).

<sup>11</sup> *Supra* Note (3), sec. 2554b-190.



A license may only issue (sec. 33)<sup>12</sup> upon an application which incorporates (sec. 36(5))<sup>13</sup> a promise that "the applicant will in all respects and in good faith conscientiously abide by all the provisions of this Act and of any other Act or ordinance relating to alcoholic beverages" etc. Also, (sec. 37)<sup>14</sup> there must be a bond "conditioned that such applicant, if granted the license sought, will not suffer or permit any violation of the provisions of this Act" etc.

Having been denied a Common Carrier's Certificate, appellant sought and was refused a transporter's license because it held no such certificate.

In sum, counsel for appellant say: The complaint charges that the Control Law is unconstitutional because repugnant to the Commerce, Due Process and Equal Protection Clauses of the Federal Constitution in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless Federal law has declared otherwise. Interstate commerce includes both importation of property within a state and exportation therefrom. Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the powers of the states over intoxicants in both of these movements were limited by the Commerce Clause. These enactments relate to importations only. Exports remain, as always, subject to that clause. "Although a state may prohibit the manufacture of liquor, if a state permits distillation, sale and transportation—as Kentucky does—the rule of law is that the state may not annex to its consent to manufacture and sell the unconstitutional ban upon carriage of interstate exports of liquors by contract carriers."

The court below rejected appellant's insistence and affirmed the asserted power of the state. Like conclusions were approved in *Commonwealth v. One Dodge Motor Truck*, 326 Pa. State Reports 120 (123 Pa. Superior Ct. Reports 311); *Clark, et al. v. State ex rel. Bobo*, 172 Tenn. 429, 113 S. W. (2d) 374; *Jefferson Co. Dis. Co. v. Clifton*, 249 Ky. 815.

<sup>12</sup> *Supra* Note (3), sec. 2554b-131.

<sup>13</sup> *Supra* Note (3), sec. 2554b-134(5).

<sup>14</sup> *Supra* Note (3), sec. 2554b-135.



The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 320; *Crane v. Campbell*, 245 U. S. 304, 307; *Seaboard Air Line Ry. v. North Carolina*, 245 U. S. 298, 304; *Samuels v. McCurdy*, 267 U. S. 188, 197-198.

Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions. Former opinions here make an affirmative answer imperative. The greater power includes the less. *Seaboard Air Line Ry. v. North Carolina*, *supra*. The state may protect her people against evil incident to intoxicants, *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; and may exercise large discretion as to means employed.

Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenues. The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce. *Sligh v. Kirkwood*, 237 U. S. 52, 59; *Clason v. Indiana*, 306 U. S. 439.

In effect we are asked by injunction to allow a distiller to do what the statute prohibits—deliver to an unauthorized carrier. Also to enable a carrier to do what it is prohibited from doing—receive and transport within the state.

*Kidd v. Pearson*, *supra*: An Act of the Iowa Legislature in general terms forbade manufacture or sale of intoxicating liquor but permitted these for mechanical or other purposes. An injunction



was approved which restrained Kidd from operating his distillery although he claimed the output would be exported for sale beyond the state. This Court said: "Whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. . . . The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

The doctrine of that case has been often applied. *Geer v. Connecticut*, 161 U. S. 519; *Ripley v. Texas*, 193 U. S. 504, 509; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357; "A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end"; *Sligh v. Kirkwood*, 237 U. S. 52; *State Board v. Young's Market Co.*, 299 U. S. 59, 63; *Clason v. Indiana*, 306 U. S. 439.

The two cases last cited recognize that the State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband.

We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivery to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity.

The point suggested in respect of Due Process is not in accord with what has been decided in the cases above referred to.

The record shows no violation of Equal Protection. A licensed Common Carrier is under stricter control than an ordinary contract carrier and may be entrusted with privileges forbidden to the latter.

Here the state law creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce.

The Motor Carrier Act of 1935 is said to secure to appellant the right claimed, but we can find nothing there which undertakes to destroy state power to protect her people against the evils of intoxi-



cants or to sanction the receipt and conveyance of articles declared contraband. The Act has no such purpose or effect.

The power of a state to regulate her internal affairs notwithstanding the consequent effect upon interstate commerce was much discussed in *South Carolina Hwy. Dept. v. Barnwell Bros.*, 303 U.S. 177, 189. There it was again affirmed that although regulation by the state might impose some burden on interstate commerce this was permissible when "an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states." In the absence of controlling language to the contrary—and there is none—the Federal Motor Carrier Act should not be brought into conflict with this reiterated doctrine.

The challenged decree must be affirmed.

Mr. Justice BUTLER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.



# MICRO CARD

TRADE

MARK



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